(16,838.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 273.

WILLIAM A. BRADY, PLAINTIFF IN ERROR,

vs.

AUGUSTIN DALY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a *Transcript of Record.*

United States Circuit Court of Appeals for the Second Circuit.

WILLIAM A. BRADY, Plaintiff in Error,
vs.
AUGUSTIN DALY, Defendant in Error.

Error to the circuit court of the United States for the southern district of New York.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Augustin Daly, plaintiff, and William A. Brady, defendant, a manifest error hath happened, to the great damage of the said William A. Brady, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 19th day of October, 1896, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may
2 cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of September, in the year of our Lord one thousand eight hundred and ninety-six and of the Independence of the United States the one hundred and twenty-first.

JOHN A. SHIELDS,
[L. S.] *Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.*

The foregoing writ is hereby allowed.
N. Y., September 22, 1896.

E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from one (1) to three hundred and seventy-nine (379) inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of William A. Brady, plaintiff in error, against Augustin Daly, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fifth day of Decem-
3 ber, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. circuit court of appeals for the second circuit. William A. Brady, plaintiff in error, *vs.* Augustin Daly, defendant in error. Original writ of error. Dittenhoefer, Gerber & James, attorneys for plaintiff in error, 96 Broadway, N. Y. Received a copy of this paper on Sept. 24, 1896. Olin, Rives & Montgomery, attorneys for plaintiff.

United States Circuit Court for the Southern District of New York.

AUGUSTIN DALY }
vs.
WILLIAM A. BRADY. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice
4 of the United States, at the city of New York, this 4th day of April, in the year one thousand eight hundred and ninety-three.

[L. S.] JOHN A. SHIELDS, *Clerk.*

OLIN, RIVES & MONTGOMERY,
Plaintiff's Attorneys, Office and Post-office Address, 32 Nassau St., New York City.

(Endorsed:) United States circuit court, southern district of New York. Augustin Daly *vs.* William A. Brady. Summons. Olin,

Rives & Montgomery, plaintiff's attorneys. To the defendant within named: Take notice, that upon default judgment will be taken for the sum of 37,400.00 dollars, in money, with interest from the 5th day of May, 1891, besides costs. Olin, Rives & Montgomery, plaintiff's attorneys. I hereby certify that on the 14th day of July, 1893, at the city of New York, in my district, I personally served the within summons upon the within-named William A. Brady, by exhibiting to him the within original and at the same time leaving with him a copy thereof. John W. Jacobus, United States marshal, southern district of New York. Dated July 25, 1893. Pl'ff's Ex. 1, May 29, '95, U. S. cir. court. U. S. circuit court. Filed Jul- 25, 1893. John A. Shields, clerk.

5 United States Circuit Court for the Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

Augustin Daly, the plaintiff herein, by Olin, Rives & Montgomery, his attorneys, complaining of the defendant, alleges—

For a first cause of action:

I. That before 1st August, 1867, he invented, composed and wrote a dramatic composition (hereinafter called play) in five acts, entitled "Under the Gas Light;" that said play and each and all of the incidents and scenes therein were his original conception and invention, and said play in dialogue, scenery, character, incidents and dramatic and theatrical situation and effect was entirely original with him.

II. That on the first day of August, 1867, he being then a citizen and resident of the United States of America, and being then the author and sole owner of said play, "Under the Gas Light," and said play then never having been printed, published, acted, performed or represented, took out a copyright therefor in the said United States by depositing a printed copy of the title of said play in the clerk's office of the district court of the United States
6 for the southern district of New York, in which district he then and long before resided, and in all respects complied with the provisions of the existing acts of Congress relating to copyrights and received from said clerk who then and there recorded said title as required by said acts, a certificate and record in the form required by said acts containing the title of said play.

III. And the plaintiff further alleges that subsequent to said last-named date he printed and published the said play "Under the Gas Light" and within three months from the date of such printing and publication, he caused a printed copy of said play to be delivered to and deposited with the clerk of said district court, and also to be delivered to and deposited in the Library of Congress, at Washington, as required by said acts of Congress. And the said plaintiff gave information of the copyright of said play "Under the Gas

Light" being secured to him by causing to be printed and inserted in the several copies of each and every book and edition of such book or composition so published and printed on the title page thereof or on the page immediately following, the following words, viz: "Entered according to act of Congress in the year 1867, by Augustin Daly in the clerk's office of the district court of the United States for the southern district of New York," and complied with all provisions of said act of Congress necessary to secure the benefit of said act of Congress to said plaintiff. And the said plaintiff alleges that in and by the aforesaid proceedings he intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now holds and possesses by virtue of the act of Congress approved 3d February, 1831, and all acts amendatory thereof and supplementary thereto, not only the sole and exclusive right and liberty to print and publish such play and book, but also the sole and exclusive right to set, perform or represent the said play or to cause it to be acted,
7 performed or represented on any stage or public place, during the whole period for which the said copyright was obtained.

IV. And the said plaintiff further alleges that the said play was produced, performed and represented for the first time in any place or on any stage on the 12th August, 1867, under his direction and for his benefit at the New York theater, a public place of theatrical amusement in the city of New York.

V. And the said plaintiff further alleges that the principal scenes, situations and incidents of said play "Under the Gas Light" were highly original and of an extraordinary novel nature, and particularly the scene and incident at the end of the third scene of the fourth act of said play, commonly called (after being so publicly performed) "railroad scene" or sensation, in which one of the characters in said play is represented as overpowered and bound by another of the characters, and laid helpless upon the rails of a railroad track in such a manner and with the presumed intent that the railroad train momentarily expected shall run him down and kill him, and just at the moment when such a fate seems inevitable, another of the characters in the play contrives to reach the intended victim and to drag him from the track as the train rushes in and passes over the spot. That this incident and scene was entirely novel and unlike any dramatic incident known to have been theretofore represented on any stage or invented by any author before said plaintiff invented and composed the same in his said play of "Under the Gas Light," and produced and represented the same as aforesaid; and the said railroad scene or sensation was, as soon as produced and represented by said plaintiff and ever since has been and is now regarded whenever it has been witnessed, to be one of the most novel, startling and attractive incidents ever represented on the public stage; that the playing of the
8 said play and railroad scene or sensation caused the same to become famous in all parts of the United States, and the said play and railroad scene was repeatedly produced, and represented in many cities and towns of the United States to the great profit of said plaintiff. That the chief value and popularity of said play

depend upon the said railroad scene or sensation contained in it and upon the representation of said scene in said play only and in no other play whatever.

VI. And the said plaintiff further alleges that soon after such production, representation and printing of said play in the United States, one Dion Boucicault, a dramatic author, actor and theatrical manager and a native and subject of Great Britain, as said plaintiff is informed and believes, and residing in England, procured a copy of said play of "Under the Gas Light" by some means and without the knowledge, privity or consent of said plaintiff, prepared therefrom a play which he called "After Dark," in which said play said Boucicault in order to make it attractive and to gain pecuniary profit therefrom, introduced several of the scenes and incidents of said plaintiff's play of "Under the Gas Light," varying them all slightly but following in them the invention and plan of the plaintiff's said play of "Under the Gas Light," in a manner which was intended to differ from it only slightly, so as colorably to be a different work when it substantially retained the attractive features of the plaintiff's said play; that among other scenes said play of "After Dark" included the said railroad scene of the plaintiff's said play of "Under the Gas Light," substituting for the surface railroad, an underground railroad; for the rescuer of the victim to be killed on the railroad, a man for a woman; for the railroad station in which the rescuer is confined, a cellar; and for the breaking down a door to escape and rescue the victim, the breaking down a door in a wall.

9 VII. And the said plaintiff further alleges, that the defendant, William A. Brady, is and at the time hereinafter mentioned was a dramatic manager and actor, and is and was engaged in giving theatrical representations at different theatres in the United States and is and was the manager and proprietor of various theatrical companies engaged in giving said representations.

VIII. And the said plaintiff further alleges, that the said defendant, with full knowledge of said plaintiff's rights in and to the aforesaid play of "Under the Gas Light" and the aforesaid railroad scene therein, is and has been producing in divers cities and towns of the United States, the said play of "After Dark," and several of the scenes and incidents of the plaintiff's said play of "Under the Gas Light," varying them slightly, but following the plan of the plaintiff's said play in a manner which was intended to differ from it only slightly, so as colorably to be a different work, while substantially retaining the attractive features of said plaintiff's play, and in particular representing, with only colorable variations, the said railroad scene of "Under the Gas Light," representing in said "After Dark" a railroad running underground in the city of London; that the said railroad scene in the play "After Dark," as written by the said Dion Boucicault and produced by the said defendant, is a palpable imitation of the plaintiff's said railroad scene in his play of "Under the Gas Light" and is plagiarized therefrom and put into the play of "After Dark" by the said defendant for the purpose

of obtaining the pecuniary benefit which might otherwise result to said plaintiff from the representation of his said play.

IX. And the said plaintiff further alleges that the said play of "After Dark" and the infringer's railroad scene therein, has
10 been performed by the said defendant or by his servants and agents in different parts of the United States without the plaintiff's consent, to the great profit and advantage of the defendant, and was indebted for its success and profit to the imitation of the said railroad scene as played in "Under the Gas Light;" that the said defendant organized a company or companies to perform the said play of "After Dark" with the said railroad scene, in different cities and towns of the United States; that said play and said infringing railroad scene has been repeatedly performed since the 30th day of April, 1891, by the said defendant's theatrical company or companies in the cities and towns of the United States.

X. The said plaintiff further alleges that the above facts were embodied in and made part of the bill of complaint in equity (filed 20th May, 1889), in an action brought by him against the said defendant and others in the circuit court of the United States for the southern district of New York to enjoin the unlawful and unlicensed performance of "After Dark" and of the said railroad scene therein as plagiarized from the said plaintiff's play of "Under the Gas Light;" that said action was eventually decided in favor of said plaintiff, and a final decree entered, adjudging the number of infringing performances of said railroad scene as performed in said play of "After Dark" to be seven hundred and forty-seven (747).

XI. And the said plaintiff further alleges that the performances of said play of "After Dark" and of the said railroad scene therein, at different cities where the plaintiff's play of "Under the Gas Light" was to be performed, seriously injured his rights as secured by copyright, and diminished and still diminishes the amount to be received by said plaintiff from the licensing of said play and said railroad scene; and that the plaintiff, by reason of the said
11 unlawful, unlicensed and infringing performances of the said play and said railroad scene by said defendant or his agents or servants, and by his announcement and advertisement thereof with the said railroad scene therein, is damaged in the sum of thirteen thousand seven hundred ($13,700) dollars.

And for a second cause of action the plaintiff, reiterating and repeating all the allegations and averments heretofore stated, alleges:

XII. On information and belief, that the defendant has unlawfully and without license produced, acted and performed, or caused to be produced, acted and performed, by himself, his servants or agents, the said play of "After Dark," containing the said infringing railway scene, as plagiarized from the plaintiff's play of "Under the Gas Light;" and the number of such infringing, unlawful and unlicensed performances is seven hundred and forty-seven, be the same more or less. That said infringing, unlawful and unlicensed performances are contrary to and in violation of the provisions of § 4966 of the Revised Statutes of the United States in such cases made and provided, whereby and by virtue of the pro-

visions of said act of Congress and of said section 4966 of the Revised Statutes of the United States the defendant did then and there become liable to pay to the said plaintiff the sum or thirteen thousand seven hundred ($13,700) dollars, lawful money of the United States, as damages.

Wherefore the plaintiff demands judgment against the defendant for the sum of thirteen thousand seven hundred ($13,700) dollars, together with interest from the fifth day of May, 1891, and his costs and disbursements in this action.

Dated August 23, 1893.

OLIN, RIVES & MONTGOMERY,
Plaintiff's Attorneys.

Office and post-office address, 32 Nassau street, New York city.

12 CITY AND COUNTY OF NEW YORK, *ss:*

Stephen H. Olin, being duly sworn, says: He is one of the firm of Olin, Rives & Montgomery, the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows its contents, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says, that the reason this verification is made by him and not by the plaintiff, is because all the material allegations of said complaint are within the personal knowledge of deponent, he having had charge of the proceedings mentioned in said complaint, and because the said plaintiff is now without the United States of America and cannot well be reached in time to verify said complaint before the time for filing same expires.

STEPHEN H. OLIN.

Sworn to before me this 23d day of August, 1893.

GEO. B. HEATH,
[L. S.] *Notary Public, N. Y. Co.*

(Endorsed:) U. S. circuit court for the southern district of New York. Augustin Daly against William A. Brady. Complaint. Olin, Rives & Montgomery, attorneys for plaintiff, 32 Nassau street, New York city. U. S. circuit court. Filed Aug. 23, 1893. John A. Shields, clerk.

13 United States Circuit Court for the Southern District of New York.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY.

The defendant, as and for an answer to the first alleged cause of action, alleges as follows:

I. That he has no knowledge or information thereof sufficient to form a belief as to whether the plaintiff, before August 1st, 1867, or

at any other time, invented, composed and wrote the dramatic composition in five acts entitled as alleged in the complaint, "Under the Gaslight," and on information and belief, he denies that the said plot and each or all of the incidents or scenes therein were the original conception or invention of the plaintiff, or that said play in dialogue, scenery, character, incidents and dramatic and theatrical situation and effect, was entirely original with him as alleged in the first paragraph of the complaint.

II. He denies on information and belief, the allegations contained in the second paragraph of the complaint.

III. On information and belief, he denies the allegations contained in the third paragraph of the complaint.

IV. The defendant has no knowledge or information thereof sufficient to form a belief as to whether the said play was produced, performed and represented for the first time in any place or
14 on any stage on the 12th of August, 1867, under the plaintiff's direction or otherwise, and for his benefit at the New York theatre, in the city of New York.

V. He denies, on information and belief, that the principal scenes, situations or incidents of said play were highly original, or of an extraordinary novel character, and particularly the scene and incident at the end of the third scene of the fourth act commonly called "railroad scene," and mentioned and referred to in the fifth paragraph of the complaint.

VI. He denies, on information and belief, that the said incident and scene referred to in the fifth paragraph of the complaint was novel or unlike any dramatic scene theretofore known to have been represented on the stage, or invented by any author before the plaintiff, as he alleges, invented and composed the same, and he denies that the said railroad scene or sensation referred to in the fifth paragraph of the complaint, as soon as produced and represented by the plaintiff, and ever since has been or is now regarded, whenever it has been witnessed as one of the most novel, startling or attractive incidents ever represented on the public stage, and denies, on information and belief, that the playing of the said play or railroad scene or sensation caused the same to become famous in all parts of the United States.

VII. He admits that the said play and railroad scene was repeatedly produced in many cities and towns of the United States, but has no knowledge or information thereof sufficient to form a belief as to whether the same was to the profit of the plaintiff as alleged in the complaint.

VIII. He denies upon information and belief that the chief value and popularity of said play depended upon the said railroad
15 scene or sensation contained in it, or that upon the representation of said scene in said play only, and in no other play whatever.

IX. Said defendant upon information and belief denies that Dion Boucicault, mentioned and referred to in the complaint, procured a copy of the said play and prepared therefrom the play called "After Dark," and denies on information and belief that the said Bouci-

cault introduced in said play "After Dark" several or any of the scenes and incidents of the play claimed by the plaintiff or substantially retained the attractive features of the play claimed by plaintiff, as alleged in the sixth paragraph of the complaint, and on information and belief denies that the said play "After Dark" included or includes the railroad scene of the play claimed by the plaintiff and entitled by him in the complaint "Under the Gaslight," as alleged in the sixth paragraph of the complaint.

X. He denies the allegations contained in the seventh paragraph of the complaint.

XI. He denies the allegations contained in the eighth and ninth paragraphs of the complaint.

XII. He admits that a bill of complaint in equity was filed on behalf of the plaintiff against this defendant William A. Brady jointly with George P. Webster and Henry C. Miner, and he admits that in said action a final decree was entered, and he denies the allegations of the tenth paragraph of the complaint, excepting as they may accord with the bill of complaint so filed, and the said decree entered, to which complaint, final decree and the record in said suit, this defendant begs leave to refer.

XIII. This defendant denies the allegations contained in the eleventh paragraph of the complaint.

16 XIV. As and for a second and further and separate answer and defense, this defendant alleges that heretofore and on or about the 20th day of May, 1889, the complainant Augustin Daly commenced a suit in equity in the United States circuit court for the southern district of New York, against this defendant George P. Webster and Henry C. Miner, wherein the plaintiff alleged that before the first day of August, 1867, he invented, composed and wrote a dramatic composition called "Under the Gaslight, a romantic panorama of the streets and homes of New York," and that thereafter, for the purpose of complying with the existing acts of Congress relating to copyrights, he caused the said composition to be printed and published, and within three months from the date of such printing and publication, he caused a printed copy of such composition so printed and published to be delivered to and deposited with the clerk of the district court of the United States for the southern district of New York, in which district plaintiff claimed he then and long before resided, which composition so printed and deposited by him, as he claimed, bore the title "Under the Gaslight, a totally original and picturesque drama of life and love in these times," which is the same play or dramatic composition referred to in the complaint in this action.

That the plaintiff further claimed in his bill of complaint, among other things, that the defendants in said action, George P. Webster and William A. Brady produced in divers cities of the United States the play "After Dark," using and producing the railroad scene in plaintiff's play, and being the same scene referred to in the complaint herein, and claimed the same to have been an imitation of the railroad scene claimed by the plaintiff in the play referred to in the complaint.

That in said action, the complainant made an application for an injunction *pendente lite* which was argued before the Hon. William J. Wallace, circuit judge of the circuit court of the United
17 States for the southern district of New York, who denied the same upon the merits, holding, deciding, adjudging and determining that the plaintiff's alleged copyright was invalid, and that he had no exclusive right in or to the said play claimed by him or to the exclusive right to the performance or production thereof, or any of the scenes therein.

That an order was accordingly entered denying the said motion for an injunction *pendente lite* upon the merits, to which order and the papers upon which the same was granted, this defendant begs leave to refer and make the same a part hereof. That thereafter testimony was taken on the part of the complainant in said action, and the defendants George P. Webster and William A. Brady, to sustain the issue presented by the bill of complaint, answer and replication, and the proofs taken by the respective parties were submitted on final hearing to the Hon. Alfred C. Coxe, circuit judge, who upon said final hearing and after a consideration of the proofs and after hearing counsel, dismissed the bill of complaint upon the merits with costs, to which decree and the proofs upon which the same was granted, this defendant begs leave to refer and makes the same a part hereof.

That in and by the said order and the said final decree it was adjudged and decreed that the complainant had no valid copyright in or to the play referred to in the complaint herein, or the exclusive right to the performance thereof, and that the said defendants had not infringed upon or violated any of the rights of the plaintiff by any performance given of the play "After Dark."

That the performances claimed in the complaint herein to have been given by the defendants and claimed to be a violation of the rights asserted and claimed by the plaintiff in the play referred to in the complaint, are the same performances which were adjudged and decreed to have been no violation of plaintiff's rights or infringement upon any exclusive right of production in the
18 play referred to in the complaint and the performances complained of in the complaint herein are or have reference to the performances which the plaintiff claims were given of the play "After Dark," subsequent to the order entered upon the decision of Mr. Justice Wallace hereinbefore referred to, and the final decree dismissing the bill of complaint hereinbefore referred to, and after the adjudication by the circuit court of the United States for the southern district of New York that the plaintiff had no exclusive right in the production of the play claimed by him, and that the performances of the play "After Dark" was not a violation of or infringement upon plaintiff's rights.

XV. As and for a third and further and separate answer and defense, this defendant, reiterating, reasserting and realleging the denials and allegations hereinbefore contained, as though the same were again fully and at length set forth, further alleges that in and by the said bill of complaint filed by the plaintiff herein against

George P. Webster, William A. Brady and Henry C. Miner, plaintiff, among other things, demanded as relief and judgment that the defendants be decreed to render a full and true account to the plaintiff of all moneys and profits received from or by reason of said performances of the said play of "After Dark" and of the railroad scene therein.

That accordingly said action proceeded to final judgment as hereinbefore alleged, and that by reason and virtue of the decision and mandate of the circuit court of appeals for the second circuit, a judgment was entered and procured by the plaintiff in the said suit in equity, to which decree and the record and proceedings in said action this defendant begs leave to refer.

That in and by said suit and the proceedings taken therein, this plaintiff elected to sue for the profits made or claimed to have been made — and from the performances of the play "After Dark," because of the claim of the plaintiff that such performances
19 violated and infringed upon the rights of the plaintiff in and to the play claimed by him and referred to in the complaint.

That the said performances for which profits were sued for and claimed by the plaintiff in the said suit were the same performances as are alleged in the complaint herein to have taken place.

XVI. As and for a further and separate answer and defense, this defendant, reiterating and realleging the allegations and denials hereinbefore contained, as though the same were again fully and at length set forth, further alleges that the alleged cause of action referred to in the complaint accrued and arose, if at all, more than two years prior to the commencement of this action.

XVII. As and for a fifth and partial as well as complete defense, this defendant, reiterating, realleging and reasserting the allegations hereinbefore contained as though the same were fully and at length again set forth, further alleges that most of the alleged performances which the plaintiff claims in this complaint were given by the defendant and which plaintiff asserts were in violation of the copyright claimed by him, were given, if at all, more than two years prior to the commencement of this action, and to that extent the alleged cause of action referred to in the complaint arose and accrued, if at all, more than two years prior to the commencement of this action.

XVIII. As and for an answer to the second alleged cause of action, this defendant, reiterating and repeating the allegations and denials hereinbefore contained as though the same were again fully and at length set forth, further denies the allegations contained in paragraph XII of the complaint.

20 XIX. As and for a second and further and separate answer and defense, this defendant reiterates and reasserts the allegations and denials contained in paragraph XIV of this answer as though the same were fully and at length again set forth.

XX. As and for a third and further and separate answer and defense, this defendant reiterates and reasserts the allegations and denials contained in paragraph XV of this answer, as though the same were fully and at length again set forth.

XXI. As and for a fourth and further and separate answer and

defense, this defendant reiterates and reasserts the allegations and denials contained in paragraph XVI of this answer as though the same were fully and at length again set forth.

XXII. As and for a fifth and further, separate, partial as well as complete answer and defense, this defendant reiterates and reasserts the allegations and denials contained in paragraph XVII of this answer as though the same were fully and at length again set forth.

Wherefore, defendant demands judgment that the complaint herein be dismissed with the costs and disbursements of this action.

DITTENHOEFER, GERBER & JAMES,
Defendant's Attorneys, 96 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss:*

William A. Brady, being duly sworn, deposes and says: That he is the defendant herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WM. A. BRADY.

Sworn to before me, this 21st day of December, 1893.

J. EMMET FLANAGAN,
Notary Public (21), *N. Y. Co.*

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record,

Do hereby certify that J. Emmet Flanagan, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 22d day of December, 1893.

[SEAL.] HENRY D. PURROY, *Clerk.*

(Endorsed:) United States circuit court. Augustin Daly *vs.* William A. Brady. Answer. Dittenhoefer, Gerber & James, attorneys for defendant, 96 Broadway, New York. Received a copy of this paper on December 28, 1893. Olin, Rives & Montgomery, attorneys for pl'ffs. U. S. circuit court. Filed Jul- 24, 1895. John A. Shields, clerk.

22 U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant. } Stipulation and Consent.

It is hereby stipulated and consented by the undersigned that the replication in the above-entitled action be served and filed "*nunc pro tunc*" as of the 16th day of January, 1894.

Dated 15th June, 1894.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Defendant.
OLIN, RIVES & MONTGOMERY,
Attorneys for Plaintiff.

23 U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant. } Replication.

The Replication of Augustin Daly, the Plaintiff herein, to the Answer of William A. Brady, Defendant Herein.

This replicant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his complaint to be true, certain and sufficient in the law; and that the said answer of William A. Brady, defendant, is uncertain, untrue and insufficient to be replied to by the replicant except in the following specific regards, viz:

1. The replicant, plaintiff herein, denies each and every allegation and assertion contained in that portion of paragraph XIV of said answer as sets forth as follows, viz: "That the performances claimed in the complaint herein to have been given by the defendants and claimed to be a violation of the rights asserted and claimed by the plaintiff in the play referred to in the complaint are the same performances which were adjudged and decreed to have been no violation of plaintiff's rights or infringement upon any exclusive
24 right of production in the play referred to in the complaint, and the performances complained of in the complaint herein are or have reference to the performances which the plaintff claims were given of the play 'After Dark,' subsequent to the order entered upon the decision of Mr. Justice Wallace hereinbefore referred to, and the final decree dismissing the bill of complaint hereinbefore referred to, and after the adjudication by the circuit court of the United States for the southern district of New York that the plaintiff had no exclusive right in the production of the play claimed by him, and that the performances of the play 'After Dark' were not a violation of or infringement upon plaintiff's rights."

II. The replicant, plaintiff herein, further denies each and every

allegation and assertion contained in paragraph XV of said answer, as alleges and asserts that in and by the suit and proceedings referred to in said paragraph XV of said answer the plaintiff elected to sue for the profits made or claimed to have been made from the performances of the play "After Dark," and that the said performances (for which the defendant alleges profits were sued for) were the same performances as are alleged in the complaint to have taken place.

III. The replicant, plaintiff herein, reiterating and reasserting the denials hereinbefore contained, further denies each and every allegation contained in paragraph XVI of said answer. And the said replicant alleges that the *præcipe* was filed and a summons issued thereon in the above-entitled action on the 5th day of May, 1893, in the office of the clerk of the United States circuit court for the southern district of New York, and that thereafter the said defendant herein was duly served with a copy of the summons and complaint herein on the 14th day of July, 1893; that a certain unlicensed, illegal and infringing performance of said play, entitled "After Dark," given on the 30th day of May, 1889, in New York, was
25 the first mentioned in the first cause of action. That thereafter said play was repeatedly performed by said defendant, his agent- or servants, and that a certain unlicensed, illegal and infringing performance of said play, entitled "After Dark," was given on the 13th day of August, 1891, in ——, and that thereafter said play was repeatedly performed by said defendant, his agents or servants.

IV. The replicant, plaintiff herein, reiterating and reasserting the denials and allegations hereinbefore contained, further denies each and every allegation contained in paragraph XVII of said answer.

And the said replicant further alleges that *all* of the unlicensed, illegal and infringing performances for which he claims damages in his complaint were given by the defendant, his agents or servants in and during the respective theatrical seasons of 1889–1890; 1890–1891; 1891–1892; 1892–1893; that said theatrical season of 1891–1892 began on the 13th day of August, 1891, and continued for the period of twenty-six weeks; that said theatrical season of 1892–1893 began on the — day of August, 1892, and continued for the period of thirteen weeks; that during said theatrical season, as above set forth, no less than seven of said unlicensed, infringing and illegal performances were given by the defendant, his agents or servants in each and every week of said theatrical season; that the total number of such unlicensed, illegal and infringing performances so given were seven hundred and forty-seven, of which number two hundred and seventy-three unlicensed, illegal and infringing performances took place, and were given by said defendant, his agents or servants on and after the 13th day of August, 1891.

V. And as and for a replication to the allegations contained in the second, third, fourth and fifth further and separate answers and defenses, as set forth in paragraphs XIX, XX, XXI and
26 XXII of said answer, the replicant, reiterating and repeating the denials hereinbefore contained as though the same were

again fully and at length set forth, further reiterates, repeats and reasserts the denials contained in paragraphs I, II, III and IV of this replication.

All which matters and things this replicant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said complaint he has already prayed.

OLIN, RIVES & MONTGOMERY,
Attorneys for Plaintiff, Replicant.

CITY AND COUNTY OF NEW YORK, *ss:*

Stephen H. Olin, being duly sworn, says: He is one of the firm of Olin, Rives & Montgomery, attorneys for the plaintiff in the above-entitled action; that he has read the foregoing replication and knows its contents, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says, that the reason this verification is made by him and not by the plaintiff is because all the material allegations of said replication are within the personal knowledge of deponent, he having had charge of the proceedings mentioned in the complaint and answer herein, and because the said plaintiff is now without the United States of America and cannot well be reached in time to verify said replication.

S. H. OLIN.

Sworn to before me this 13th day of June, 1894.
GEO. B. HEATH,
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court, southern district of New York. Augustin Daly against William A. Brady. Replication.
27 Olin, Rives & Montgomery, attorneys for plaintiff, 32 Nassau street, New York city. Due and timely service of a copy of the within replication is hereby admitted this 16th day of January, 1894. Dittenhoefer, Gerber & James, att'ys for def't. U. S. circuit court. Filed Jun- 21, 1894. John A. Shields, clerk.

United States Circuit Court for the Southern District of New York.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY.

It is hereby stipulated by and between the attorneys of record of the respective parties, that a jury be waived, and that the issues herein may be tried and determined by the circuit court without the intervention of a jury, and that this stipulation be filed with the clerk of the court.

Dated New York, May 29, 1895.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Defendant.
OLIN, RIVES & MONTGOMERY,
Attorneys for Plaintiff.

(Endorsed:) U. S. circuit court, southern district of New York. Augustin Daly *vs.* William A. Brady. Stipulation waiving jury trial. Dittenhoefer, Gerber & James, attorneys for def't, 96 Broadway, New York. U. S. circuit court. Filed Jun 5, 1895. John A. Shields, clerk.

28 Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
v.
WILLIAM A. BRADY.

This action having come on regularly for trial before the circuit court of the United States for this district on May 29, 1895, and the parties, by their attorneys of record, having filed with the clerk a stipulation in writing signed by them, waiving a jury and consenting that the issues should be tried by the court without a jury, * * * I, holding said court and presiding therein, thereupon took the proofs offered by the respective counsel, and hereby make the following special findings of fact and conclusions of law.

Findings of Fact.

I. That before August 1, 1867, the plaintiff invented and composed and was the author of a dramatic composition or play in five acts, entitled, "Under the Gas Light," which play was original with him.

II. That on the first day of August, 1867, the plaintiff being a citizen and resident of the United States of America, and being then the sole and exclusive proprietor and owner of said dramatic composition, and the same then never having been printed, pub-
29 lished, acted, performed or represented, took out a copyright therefor in the United States by depositing a printed copy of the title, viz:

Under the Gas Light.

A romantic panorama of the streets and homes of New York,"

of said composition in the clerk's office of the district court of the United States, for the southern district of New York, of which district the plaintiff was then a resident, and in all respects complied with the provisions of the existing acts of Congress relating to copyrights, and received from said clerk, who then and there recorded said title, as required by said acts, a certificate and record in the form required by such acts, containing the title of said composition, and that the said Daly has been continuously since said day the sole and exclusive proprietor of said dramatic composition and of said copyright.

III. That the plaintiff subsequently and within a reasonable time thereafter, caused the said composition to be printed and published,

and within three months from the date of such printing and publication he caused a printed copy of said composition so printed and published to be delivered to and deposited with the clerk of said district court, and also to be delivered to and deposited in the Library of Congress at Washington, for the use of said library, as required by said acts of Congress. The title as published was:

Under the Gas Light.

A totally original and picturesque drama

OF

Love and life in these times.

IV. And that the plaintiff gave information of the copyright of said composition being secured to him by causing to be
30 printed and inserted in the several copies of each and every book and edition of such book or composition so published and printed, on the title page thereof, or on the page immediately following, the following words, viz: "Entered according to act of Congress, in the year 1867, by Augustin Daly, in the clerk's office of the district court of the United States for the southern district of New York."

V. That the plaintiff, in and by the aforesaid proceedings, intended to obtain, hold and possess, and did obtain, hold and possess, by virtue of the act of Congress approved February 3, 1831, and the acts amendatory thereof and supplementary thereto, not only the sole and exclusive right and liberty to print and publish such dramatic composition and book, but also the sole and exclusive right to act, perform or represent the said dramatic composition or play, and to cause it to be acted, performed or represented on any stage or public place during the whole period for which the said copyright was obtained.

VI. That the said play was produced by the plaintiff, as alleged in the complaint, and has been often produced by him, and for his profit and advantage by his employees or by persons licensed to procure the same; and the plaintiff has received as fees from different persons performing the same under his license, substantial license fees in almost every year since 1868.

VII. That the cause of the success and profit of the play was the scene and incident in the end of the third scene of the fourth act of the said composition, commonly called, after being so publicly performed, the railroad scene or sensation, in which one of the characters in said composition is represented as secured by another of the characters and laid helpless upon the rail of a railroad track in such a manner and with the presumed intent that the railroad
31 train momentarily expected shall run him down and kill him, and just at the moment when such a fate seems inevitable another of the characters in the composition contrives to reach the intended victim and to drag him from the track as the train rushes in and passes over the spot.

VIII. That this incident and scene, as thus carried out, was novel

and unlike any dramatic incident known to have been theretofore represented on any stage or invented by any author before the plaintiff.

IX. That the chief value of said composition and its popularity depend upon the said railroad scene or sensation contained in it, and upon the representation of said scene, only, which scene constituted its essential feature; and that at the times of the acts of the defendant hereinafter referred to the sole commercial value of the said play of "Under the Gas Light," and the source of its power of earning royalties, consisted of the said railway scene.

X. That soon after said play was produced, Dion Boucicault, a native and subject of Great Britain, without the knowledge or consent of the plaintiff, prepared a play called "After Dark," in which he introduced a railway scene varying slightly from the railway scene as it appeared in "Under the Gas Light," so as to be colorably different but substansially the same, as alleged in the complaint.

XI. The defendant, William A. Brady, is and at the times hereinafter mentioned was a manager and actor. The plaintiff was at the commencement of this suit, a citizen of the State of New York, and the defendant was a resident therein, whose citizenship was not averred, and this court obtains its jurisdiction, not by reason of divers citizenship, but solely under the copyright laws of the United States.

32 XII. The defendant, at the times hereinafter mentioned, without the consent of the plaintiff, produced and procured to be publicly performed and represented, in divers cities, the said play "After Dark," including the said railway scene, which, as produced by the said defendant, was substantially the same, although colorably different from the plaintiff's play of "Under the Gas Light," as alleged in the complaint.

XIII. That said play "After Dark" has been publicly produced and represented by the said defendant and his agent in different parts of the United States without the plaintiff's consent, and that such performance and production of the said play took place seven hundred and forty-seven (747) times, between June 19, 1889, and October 4, 1892, and that of the said seven hundred and forty-seven (747) performances one hundred and fifty-six (156) took place in or after August, 1891, and within two years of the commencement of this action, which was commenced August 23, 1893. All the evidence upon the subject of the number of these performances was obtained from the defendant, by the plaintiff's examination of him, in the accounting before the master in the equity suit hereinafter mentioned.

XIV. That the plaintiff had required and received license fees for the production of the said railroad scene prior to the said infringements by the defendant. Said license fees were not uniform; they diminished as the play, in process of time, became more familiar to the public. Ten dollars for each performance of the said railway scene was the smallest and most recent fee that had been paid, and was a reasonable royalty for the defendant to have paid for the use thereof.

XV. That a portion of the royalties received by the plain-
33 tiff for the production of " Under the Gas Light " prior to the said infringements by the defendant were for the use of this scene alone.

XVI. On May 20, 1889, the plaintiff brought a suit in equity against George P. Webster, William A. Brady, the present defendant, and Henry C. Miner in the circuit court of the United States for the southern district of New York, in which he prayed that they should be enjoined against the further performance of said play of "After Dark " upon the ground that such performance or representation was an infringement of the copyright, and for an accounting of all money and profits received from or by reason of the performances of the play "After Dark " and of the railroad scene therein.

The said court, on June 19, 1889, denied the plaintiff's motion for an injunction *pendente lite*, after an appearance of the defendants and a hearing upon said motion, upon the ground that there was a material variance between the registered title and the published title of " Under the Gas Light," and that therefore the complainant had not a valid copyright.

After proofs had been taken on the issues joined, the circuit court for said district followed the decision of the court upon the said motion and dismissed the bill, with costs, on November 4, 1891.

An appeal was taken by the plaintiff from the decree dismissing the complaint, to the circuit court of appeals, which court, on the 4th day of October, 1892, reversed the decree of the circuit court, and remanded the cause with instructions to enter the usual decree for an accounting and perpetual injunction. That the said circuit court held that the complainant's copyright was valid, and had been infringed by the defendants in said play "After Dark " by placing a character on the railroad tracks in apparent peril of his life from an approaching train, and having him rescued by another character.

XVII. Pursuant to said mandate a decree for a perpetual
34 injunction by the circuit court was entered on November 5, 1892, and John E. Ward, Esq., one of the masters of said court, was directed to take proof of the number of performances given by the defendants and where each performance took place, said defendants being directed to attend with their books and papers. That the defendant did attend, pursuant to the said decree of the said court before the master and gave evidence for the plaintiff. Upon said examination, the defendant's counsel objected to the defendant being compelled to produce the manuscript play of "After Dark," upon the ground that " neither the defendant nor his books can be used against him in any proceeding wherein it is sought to obtain a penalty or for the purposes of this hearing before the master." The decree did not direct the master to ascertain anything in regard to profits. No evidence was offered upon that subject, and no finding was made thereon.

A final decree in said cause, accepting the master's report and making the findings of the master the findings of the court, was

entered on April 1, 1893. No judgment or decree for profits was asked or rendered.

Conclusions of Law.

1. That the copyright of the dramatic composition entitled "Under the Gas Light," obtained on August 1, 1867, by Augustin Daly, being the copyright referred to in the complaint herein, is good and valid; that said railway scene is covered and protected by said copyright.

2. That the acts of the defendant were in disregard of said copyright and violated the plaintiff's exclusive rights thereunder by producing and publicly representing, without the plaintiff's consent, a colorable imitation of the substantial and material portion of said "Under the Gas Light," and by using and producing the railway scene as copyrighted in the dramatic composition entitled "Under the Gas Light."

35 3. That section 4966 of the Revised Statutes confers upon the courts of the United States their only jurisdiction in an action between citizens of the same State, for the recovery of damages for the unauthorized public performance and representation of a dramatic composition for which a copyright has been obtained (Boucicault *v.* Hart, 13 Blatchf., 47).

4. That all actions at law in the courts of the United States, between citizens of the same State, by a proprietor of a copyrighted dramatic composition, for the recovery of moneys as damages or penalties against a person who, without consent, has given public representations of such composition, are controlled by the provision of section 4966.

5. That the evidence does not authorize an increase of damages above the minimum amount provided by said section, and that the court in this suit has no power to establish a rule of damages for any representation or set of representations below the minimum provision of the statute.

6. If section 4966 is to be construed as a penal statute, the only testimony in this case in regard to the number of representations, which was the testimony of Brady in the accounting and the master's report which is based solely upon the evidence given by the defendant before him in the equity suit, was inadmissible upon the ground that evidence obtained from a party by means of a judicial proceeding must not be used against him for the enforcement of a penalty (Johnson *v.* Donaldson, 18 Blatchf., 287). Such evidence can be used in aid of the recovery of damages in a suit at law (Atwill *v.* Ferrett, 2 Blatchf., 39).

7. Section 4966 declares that the person who violates its provisions shall be liable to damages, which are in all cases to be
36 assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance as to the court shall seem just. The amount is not to be measured by the pecuniary injury, but in all cases is to be the statutory sum, subject to be increased if the circumstances of aggravation or of

injury or of willfulness, shall convince the tribunal that justice requires an increase.

The injury to the proprietor is but one element in the case. The phraseology of the section suggests a punitive rather than a remedial purpose, and the phraseology of the statute as originally passed in 1886 (4 Stats. at Large, 138), conveyed the same suggestion that a penalty was to be inflicted rather than that a recompense for the injury was to be obtained. The general intent of Congress, apart from proceedings in equity and from actions at law for damages for the unauthorized publication of a manuscript (sec. 4967), seems to have been to enforce the copyright laws by penalties and forfeitures, rather than by the ordinary common-law remedies.

Section 4968 provides a limitation of two years for actions for forfeitures and penalties. If section 4966 is not a penalty no Federal statute of limitations is applicable, and it can hardly be supposed that it was the intent of Congress to permit so serious a statutory rate of damages to run without Federal statutory limitation. The damages in the corresponding section of the English copyright statutes (3 and 4 William, 14 and 15, sec. 2), in which damages of forty shillings were the minimum, are regarded as a penalty (Chatterton *v.* Cave, 3 Appeal Cases, 489).

My conclusion is that the section is penal rather than remedial in its character.

8. That there has been in this case no accounting of profits and no election to endeavor to obtain profits for any representation of the dramatic composition which is the subject of this suit, and that there has been no finding and no adjudication upon the subject of profits.

37 9. That if the master's report or the evidence upon which it was based, had been admissible, the plaintiff would have been entitled to judgment against the defendant in the sum of fifty dollars for each performance falling within the period of two years prior to the commencement of this action, that is to say, for one hundred and fifty-six performances, the sum of $7,800, but that there was no adequate testimony before the court upon which to found a judgment for the plaintiff, and that as the case now stands the defendant is entitled to judgment, with costs.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) United States circuit court, southern dist. of N. Y. Augustin Daly *vs.* William A. Brady. Findings of fact, &c. Shipman, C. J. U. S. circuit court. Filed Jun- 24, 1895. John A. Shields, clerk.

38 At a stated term of the United States circuit court for the southern district of New York, held at the United States court-house building in the city of New York, on the 15th day of November, 1895.

Present: Hon. Nathaniel Shipman, circuit judge.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

On reading and filing the order to show cause, dated 3d August, 1895, and the affidavits of Stephen H. Olin, dated July 31, 1895, and Richard Dorney, dated August 1, 1895, thereto annexed, and also the affidavit of William A. Brady, dated October —, 1895, and on reading the pleadings and proceedings heretofore filed herein; and on hearing Stephen H. Olin, Esq., of counsel for the motion, and A. J. Dittenhoefer, Esq., in opposition thereto, it is, on motion of Olin, Rives & Montgomery, solicitors for the plaintiff,

Ordered, that the motion for a new trial is granted to the extent that the cause is opened for the purpose of allowing either party to present additional testimony in regard to the numbers and times of the representation, if any there were, of the play of "After Dark" by the defendant within two years prior to the commencement of this suit, and for the production of such testimony this cause is set down to be heard during the two weeks after January 6, 1896.

N. SHIPMAN,
Circuit Judge.

39 U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

SIRS: Please take notice that we shall present for settlement an order, a copy of which is served upon you herewith, to Hon. Nathaniel Shipman, circuit judge, at his chambers, in the United States post-office and court-house building, in the city of New York, on the 12th day of November, 1895, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

Dated 8th November, 1895.

Yours, &c., OLIN, RIVES & MONTGOMERY,
Attorneys for Plaintiff.

To Messrs. Dittenhoefer, Gerber & James, attorneys for defendant.

(Endorsed:) U. S. circuit court, southern district of New York. Augustin Daly against William A. Brady. Order with notice of settlement. Olin, Rives & Montgomery, attorneys for plaintiff, 32 Nassau street, New York city. Copy received Nov. 7, 1895. Dittenhoefer, Gerber & James. U. S. circuit court. Filed Nov. 15, 1895. John A. Shields, clerk.

40 Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY.

SHIPMAN, *C. J.:*

This case was tried by the court, a jury having been waived, and the record testimony which was offered was received, subject to the conclusion of the court in regard to its effect and admissibility. The court subsequently held that the testimony could not be used to subject the defendant to a penalty and that the statute was penal in its character. The plaintiff, before judgment, moves for a new trial for the purpose of giving other testimony which, it is alleged, can be obtained, and which will prove the facts contained in the offered record.

The questions of statutory law involved in this case are important to both the parties, and the final decision by the appellate court upon all the accessible facts will be valuable to those interested in the law of copyright relating to dramatic compositions.

But the case ought not to be opened upon the ground of its general importance to that portion of the public which is interested in the subject of copyright. Unless the furtherance of justice, as between the parties, requires the allowance of the motion, it should be denied. It is undoubtedly a fact that a jury was waived, because it was thought by counsel on both sides that the only ques-
41 tions to be considered were those of law, some of which were of novel character. The plaintiff's counsel did not, therefore, anticipate that the number of performances was to be seriously contested and was perhaps misled into this opinion by the construction which he placed upon certain paragraphs in the answer.

It was therefore supposed that the facts were in compact compass and that the trial before the court would be an argument upon sundry questions of law.

These circumstances take this motion out of the state of facts which ordinarily present themselves upon motions for the introduction of new testimony and call upon the court to give the plaintiff an opportunity to present the facts of his case by competent testimony.

The motion is granted to the extent that the cause will be opened for the purpose of allowing either party to present additional testimony in regard to the number and times of the representations, if any there were, of the play of "After Dark" by the defendant within two years prior to the commencement of this suit.

The order will be settled upon notice.

(Endorsed:) U. S. circuit court, southern dist. of New York. Augustin Daly *vs.* William A. Brady. Opinion, Shipman, C. J. U. S. circuit court. Filed Nov. 4, 1895. John A. Shields, clerk.

42 Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
v.
WILLIAM A. BRADY.

In pursuance of an order of this court that the above-entitled cause be opened for the purpose of allowing either party to present additional testimony, in regard to the number and times of the representations of "After Dark" by the defendant within two years prior to August 23, 1893, such additional testimony was presented by each party at the April term, 1896, of said court, to wit, on April 9, 1896, before me, holding said court and presiding therein, and upon such testimony, the following special findings of fact are hereby made:

Findings of Fact.

Said play of "After Dark" has been publicly produced and represented by the said defendant and his agents in different parts of the United States without the plaintiff's consent for more than two years before August 23, 1893, and such performances and productions of the said play took place at least one hundred and twenty-six times between August 24, 1891, and October 5, 1892. After said October 5, 1892, a change was made by the defendant in the representation of the railroad scene whereby the infringement ceased.

The evidence as to these performances and all performances subsequent to August 24, 1891, is entirely independent of the
43 evidence obtained from the defendant by the plaintiff's examination of him in the accounting before the master in the equity suit mentioned in the prior finding of facts. No pleading or evidence of the defendant has been used or taken in evidence in ascertaining any facts as to performances or for the enforcement of any alleged liability in this case.

All the conclusions of law heretofore stated, except the ninth, remain unchanged. The words in the ninth finding after the figures "$7,800" are erased, and in lieu of them the following are substituted. Upon the new and adequate testimony before the court, the plaintiff is entitled to judgment against the defendant of $50 for each performance falling within the period of two years prior to the commencement of this action, that is to say, for 126 performances the sum of $6,300, with costs. One count brought under section 4966 can for the sake of brevity and convenience include averments of a series or a number of performances and can properly claim damages therefor (Stephen's Pleading, 268; Longworth *v.* Knapp, 4 Abb. Pr., 116).

The testimony for the plaintiff except that of one witness was taken by depositions.

Divers objections were taken to the whole of each deposition and each was asked to be excluded. The depositions of Palmer, Kingsbury and Hayes were taken because each resided more than one hundred miles from the place of trial, and the magistrate certifies

to the truth of this averment. The deposition of Meredith was taken in Philadelphia, where he was temporarily, the reason given in the certificate being that he was going out of the southern district of New York, and more than one hundred miles from the place of trial. He was at that time going from Philadelphia to Pittsburgh. His deposition showed that he lived in Boston and more than one hundred miles from the place of trial and did not live in the southern district of New York, and upon the trial it appeared that that was the reason for taking the deposition. These depo-
44 sitions were admitted without calling upon the plaintiff to prove that the witnesses still resided one hundred miles from the place of trial, in accordance with the rule as announced in Whitford *v.* Clark Co., 119 U. S., 522, "When a witness, whose deposition is taken *de bene esse*, under Revised Statutes, sec. 863, lives more than one hundred miles from the place of trial when the deposition is taken, it will be presumed that he continues to live there at the time of trial, and no further proof on that subject need be offered by the party offering the deposition, unless this presumption is overcome by proof upon the other side." The defendant offered no proof upon the subject. The immediate reduction to writing of the stenographer's minutes and the signature of the witnesses to such written deposition were waived by the defendant. The depositions of Westbrook, Corbett, Bassett, McIntyre, Heath and McConnell, were taken by stipulation on the part of the defendant, and not in pursuance of section 863. Instead of subjecting the witnesses to the trouble and delay of an examination in court or elsewhere, the defendant stipulated to produce them for examination and that their depositions might be taken in the city of New York. The defendant objected to the testimony of Kingsbury in regard to the receipts at St. Paul from the performances of "After Dark" in January, 1892, and his statement, so far as it was obtained from the statement book kept by Mr. Bixby, is excluded. The testimony itself is unimportant, and is not material in value. The four exhibits from newspapers, offered in connection with the testimony of Westbrook, were objected to and are excluded. The programme offered in connection with the testimony of Corbett was objected to and is excluded. The whole testimony of Corbett, Bassett, Heath and McConnell was of no value, except the fact con-
tained in the testimony of Bassett and Corbett that the latter
45 was in New Orleans in September, 1892, with the Brady "After Dark" Company.

The deposition of Robinson was not offered by the plaintiff.

The programme offered in connection with Kingsbury's testimony was admitted, because he identifies the programme as the one actually used in 1892 at the opera house in St. Paul.

The testimony of Meredith: "He told me something about having in a contract that he was to play it there" (in Brooklyn), was stricken out upon motion of the defendant.

The rosters or route lists which were shown to witnesses by the plaintiff to refresh their recollection and were filed for identification, or were attached to depositions, were not regarded.

The following question to Nanine Palmer: "Do you remember seeing Corbett in New Orleans?" and the question to Kingsbury: "Do you remember a play being performed?" &c., were objected to as leading, and were excluded. The other objections which were taken by the defendant and which have not been hereinbefore referred to, to the depositions offered by the plaintiff, or to any question or answer thereto were overruled.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) Circuit court U. S., south. dist. N. Y. Augustin Daly *vs.* William A. Brady. Additional findings of fact and conclusions of law. Shipman, J. U. S. circuit court. Filed Jul- 14, 1896. John A. Shields, clerk.

46 Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
against
WILLIAM A. BRADY.

This action having come on regularly for trial on the 29th day of May, 1895, at a stated term of the circuit court of the United States, second circuit, southern district of New York, Hon. Nathaniel Shipman, circuit judge, presiding, and the parties hereto, by their respective attorneys of record, having duly filed with the clerk a stipulation in writing, signed by them, waiving a jury and consenting that the issues should be tried by the court without a jury; and the court having duly heard the allegations and the proofs of the parties, and the argument of counsel, and having thereafter, to wit, on the 24th day of June, 1895, duly made and filed a decision containing the following findings of fact and conclusions of law:

Findings of Fact.

I. That before August 1, 1867, the plaintiff invented and composed and was the author of a dramatic composition or play in five acts, entitled "Under the Gas Light," which play was original with him.

II. That on the first day of August, 1867, the plaintiff being a citizen and resident of the United States of America, and being then the sole and exclusive proprietor and owner of said
47 dramatic composition, and the same then never having been printed, published, acted, performed or represented, took out a copyright therefor in the United States by depositing a printed copy of the title, viz:

"Under the Gas Light,

A romantic panorama of the streets and

Homes of New York,"

of said composition in the clerk's office of the district court of the United States for the southern district of New York, of which district the plaintiff was then a resident, and in all respects complied with the provisions of the existing acts of Congress relating to copyrights, and received from said clerk, who then and there recorded said title as required by said acts, a certificate and record in the form required by such acts, containing the title of said composition; and that the said Daly has been continuously since said day the sole and exclusive proprietor of said dramatic composition and of said copyright.

III. That the plaintiff subsequently and within a reasonable time thereafter, caused the said composition to be printed and published, and within three months from the date of such printing and publication he caused a printed copy of said composition so printed and published to be delivered to and deposited with the clerk of said district court, and also to be delivered to and deposited in the Library of Congress, at Washington, for the use of said library, as required by said acts of Congress. The title as published—

Under the Gas Light,

A totally original and picturesque drama

OF

Love and life in these times.

48 And that the plaintiff gave information of the copyright of said composition being secured to him by causing to be printed and inserted in the several copies of each and every book and edition of such book or composition so published and printed, on the title page thereof, or on the page immediately following, the following words, viz: "Entered according to act of Congress, in the year 1867, by Augustin Daly, in the clerk's office of the district court of the United States for the southern district of New York.

V. That the plaintiff, in and by the aforesaid proceedings, intended to obtain, hold and possess, and did obtain, hold and possess, by virtue of the act of Congress, approved February 3, 1831, and the acts amendatory thereof and supplementary thereto, not only the sole and exclusive right and liberty to print and publish such dramatic composition and book, but also the sole and exclusive right to act, perform or represent the said dramatic composition or play, and to cause it to be acted, performed or represented on any stage or public place during the whole period for which the said copyright was obtained.

VI. That the said play was produced by the plaintiff as alleged in the complaint, and has been often produced by him and for his profit and advantage, by his employees or by persons licensed to

produce the same, and the plaintiff has received, as fees from different persons performing the same under his license, substantial license fees in almost every year since 1868.

VII. That the cause of the success and profit of the play was the scene and incident in the end of the third scene of the fourth act of the said composition, commonly called, after being so publicly performed, the railroad scene or sensation, in which one of the
49 characters in said composition is represented as secured by another of the characters and laid helpless upon the rail of a railroad track in such a manner and with the presumed intent that the railroad train momentarily expected shall run him down and kill him, and just at the moment when such a fate seems inevitable another of the characters in the composition contrives to reach the intended victim and to drag him from the track as the train rushes in and passes over the spot.

VIII. That this incident and scene, as thus carried out, was novel and unlike any dramatic incident known to have been theretofore represented on any stage or invented by any author before the plaintiff.

IX. That the chief value of said composition and its popularity depend upon the said railroad scene or sensation contained in it, and upon the representation of said scene only, which scene constituted its essential feature; and that at the time of the acts of the defendant hereinafter referred to the sole commercial value of the said play of "Under the Gas Light," and the source of its power of earning royalties, consisted of the railway scene.

X. That soon after said play was produced Dion Boucicault, a native and subject of Great Britain, without the knowledge or consent of the plaintiff, prepared a play called "After Dark," in which he introduced a railway scene varying slightly from the said railway scene as it appeared in "Under the Gas Light," so as to be colorably different but substantially the same, as alleged in the complaint.

XI. The defendant, William A. Brady, is and at the times hereinafter mentioned was a manager and actor. The plaintiff was at the commencement of this suit a citizen of the State of New York, and the defendant was a resident therein, whose citizenship
50 was not averred, and this court obtains its jurisdiction, not by reason of diverse citizenship, but solely under the copyright laws of the United States.

XII. The defendant, at the times hereinafter mentioned, without the consent of the plaintiff, produced and procured to be publicly performed and represented, in divers cities, the said play of "After Dark," including the said railway scene, which, as produced by the said defendant, was substantially the same, although colorably different from the plaintiff's play of "Under the Gas Light," as alleged in the complaint.

XIII. That said play "After Dark" has been publicly produced and represented by the said defendant and his agent in different parts of the United States without the plaintiff's consent, and that such performance and production of the said play took place seven

hundred and forty-seven (747) times, between June 19, 1889, and October 4, 1892, and that of the said seven — and forty-seven (747) performances one hundred and fifty-six (156) took place in or after August, 1891, and within two years of the commencement of this action, which was commenced August 23, 1893. All the evidence upon the subject of the number of these performances was obtained from the defendant, by the plaintiff's examination of him, in the accounting before the master in the equity suit hereinafter mentioned.

XIV. That the plaintiff had required and received license fees for the production of the said railroad scene prior to the said infringements by the defendant. Said license fees were not uniform; they diminished as the play, in process of time, became more familiar to the public. Ten dollars for each performance of the said railroad scene, was the smallest and most recent fee that had been paid, and was a reasonable royalty for the defendant to have paid for the use thereof.

51 XV. That a portion of the royalties received by the plaintiff for the production of "Under the Gas Light" prior to the said infringements by the defendant were for the use of this scene alone.

XVI. On May 20, 1889, the plaintiff brought a suit in equity against George P. Webster, William A. Brady, the present defendant, and Henry C. Miner, in the circuit court of the United States for the southern district of New York, in which he prayed that they should be enjoined against the further performance of said play of "After Dark" upon the ground that such performance or representation was an infringement of the copyright, and for an accounting of all money and profits received from or by reason of the performance of the play "After Dark" and of the railroad scene therein.

The said court on June 19, 1889, denied the plaintiff's motion for an injunction *pendente lite*, after an appearance of the defendants and a hearing upon said motion, upon the ground that there was a material variance between the registered title and the published title of "Under the Gas Light," and that, therefore, the complainant had not a valid copyright.

After proofs had been taken on the issues joined, the circuit court for said district followed the decision of the court upon the said motion and dismissed the bill, with costs, on November 4, 1891.

An appeal was taken by the plaintiff from the decree dismissing the complaint, to the circuit court of appeals, which court, on the 4th day of October, 1892, reversed the decree of the circuit court, and remanded the cause with instructions to enter the usual decree for an accounting and perpetual injunction. That the said circuit court held that the complainant's copyright was valid and had been infringed by the defendants in said play "After Dark" by placing a character on the railroad tracks in apparent peril of his life from an approaching train, and having him rescued by another character.

52 XVII. Pursuant to said mandate a decree for a perpetual injunction by the circuit court was entered on November 5,

1892, and John E. Ward, Esq., one of the masters of said court, was directed to take proof of the number of performances given by the defendants and where each performance took place, said defendants being directed to attend with their books and papers. That the defendants did attend, pursuant to the said decree of the said court before the master, and gave evidence for the plaintiff. Upon said examination, the defendants' counsel objected to the defendant being compelled to produce the manuscript play of "After Dark," upon the ground that "neither the defendant nor his books can be used against him in any proceeding wherein it is sought to obtain a penalty, or for the purposes of this hearing before the master." The decree did not direct the master to ascertain anything in regard to profits. No evidence was offered upon that subject and no finding was made thereon.

A final decree in said cause, accepting the master's report and making the findings of the master the findings of the court, was entered on April 1, 1893. No judgment or decree for profits was asked or rendered.

Conclusions of Law.

1. That the copyright of the dramatic composition entitled "Under the Gas Light," obtained on August 1, 1867, by Augustin Daly, being the copyright referred to in the complaint herein, is good and valid; that said railway scene is covered and protected by said copyright.

2. That the acts of the defendant were in disregard of said copyright and violated the plaintiff's exclusive rights thereunder by producing and publicly representing, without the plaintiff's consent, a colorable imitation of the substantial and material portion
53 of said "Under the Gas Light," and by using and producing the railway scene as copyrighted in the dramatic composition, entitled "Under the Gas Light."

3. That section 4965 of the Revised Statutes confers upon the courts of the United States their only jurisdiction in an action between citizens of the same State, for the recovery of damages for the unauthorized public performance and representation of a dramatic composition for which a copyright has been obtained (Boucicault *v.* Hart, 13 Blatchf., 47).

4. That all actions at law in the courts of the United States, between citizens of the same State, by a proprietor of a copyrighted dramatic composition, for the recovery of moneys as damages or penalties against a person who, without consent, has given public representations of such composition, are controlled by the provisions of section 4966.

5. That the evidence does not authorize an increase of damages above the minimum amount provided by said section, and that the court in this suit has no power to establish a rule of damages for any representation or set of representations below the minimum provision of the statute.

6. If section 4966 is to be construed as a penal statute, the only

testimony in this case in regard to the number of representations, which was the testimony of Brady in the accounting and the master's report, which is based solely upon the evidence given by the defendant before him in the equity suit, was inadmissible upon the ground that evidence obtained from a party by means of judicial proceedings must not be used against him for the enforcement of a penalty (Johnson *v.* Donaldson, 18 Blatchf., 287). Such evidence can be used in aid of the recovery of damages in a suit at law (Atwill *v.* Ferrett, 2 Blatchf., 39).

54 7. Section 4966 declares that the person who violates its provisions shall be liable to damages, which are in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance as to the court shall seem just. The amount is not to be measured by the pecuniary injury, but in all cases is to be the statutory sum, subject to be increased if the circumstances of aggravation or of injury or of willfulness shall convince the tribunal that justice requires an increase.

The injury to the proprietor is but one element in the case. The phraseology of the section suggests a punitive rather than a remedial purpose, and the phraseology of the statute as originally passed in 1831 (4 Stats. at Large, 138), conveyed the same suggestion that a penalty was to be inflicted rather than that a recompense for the injury was to be obtained. The general intent of Congress, apart from proceedings in equity and from actions at law for damages for the unauthorized publication of a manuscript (sect. 4967), seems to have been to enforce the copyright laws by penalties and forfeitures, rather than by the ordinary common-law remedies.

Section 4968 provides a limitation of two years for actions for forfeiture and penalties. If section 4966 is not a penalty no Federal statute of limitations is applicable, and it can hardly be supposed that it was the intent of Congress to permit so serious a statutory rate of damages to run without Federal statutory limitation. The damages in the corresponding section of the English copyright statutes (3 and 4 William, 14 and 15, sect. 2), in which damages of forty shillings were the minimum, are regarded as a penalty (Chatterton *v.* Cave, 3 Appeal Cases, 489).

My conclusion is that the section is penal rather than remedial in its character.

55 8. That there has been in this case no accounting of profits and no election to endeavor to obtain profits for any representation of the dramatic composition which is the subject of this suit, and that there has been no finding and no adjudication upon the subject of profits.

9. That if the master's report or the evidence upon which it was based, had been admissible, the plaintiff would have been entitled to judgment against the defendant in the sum of fifty dollars for each performance falling within the period of two years prior to the commencement of this action, that is to say, for one hundred and fifty-six performances, the sum of $7,800, but that there was no adequate testimony before the court upon which to found a judg-

ment for the plaintiff, and that, as the case now stands, the defendant is entitled to judgment, with costs.

And in pursuance of an order of this court, duly made and filed herein in the office of the clerk of this court on the 15th day of November, 1895, this cause having been opened and additional testimony having been presented by each party at the April term, 1896, of this court, to wit, on April 9, 1896, before Hon. Nathaniel Shipman, holding said court and presiding therein; and the court having thereafter, to wit, on the 13th day of July, 1896, duly made and filed a decision containing the following findings of fact and conclusions of law, viz:

Findings of Fact.

Said play of "After Dark" has been publicly produced and represented by the said defendant and his agents in different parts of the United States, without the plaintiff's consent, for more than two years before August 23, 1893, and such performances and productions of the said play took place at least one hundred and twenty-six times between August 24, 1891, and October 5, 1892.

56 After said October 5, 1892, a change was made by the defendant in the representation of the railroad scene whereby the infringement ceased.

The evidence as to these performances and all performances subsequent to August 24, 1891, is entirely independent of the evidence obtained from the defendant by the plaintiff's examination of him in the accounting before the master in the equity suit mentioned in the prior finding of facts. No pleading or evidence of the defendant has been used or taken in evidence in ascertaining any facts as to performances, or for the enforcement of any alleged liability in this case.

All the conclusions of law heretofore stated, except the ninth, remain unchanged. The words in the ninth finding, after the figures "$8,700," are erased, and in lieu of them the following are substituted. Upon the new and adequate testimony before the court, the plaintiff is entitled to judgment against the defendant of $50 for each performance falling within the period of two years prior to the commencement of this action, that is to say, for 126 performances, the sum of $6,300, with costs. One count brought under section 4966 can, for the sake of brevity and convenience, include averments of a series or a number of performances, and can properly allow damages therefor (1 Stephens' Pleading, 268; Longworthy *v.* Knapp, 4 Abb. Pr., 119).

The testimony for the plaintiff, except that of one witness, was taken by depositions.

Divers objections were taken to the whole of each deposition, and each was asked to be excluded. The depositions of Palmer, Kingsbury and Hayes were taken because each resided more than one hundred miles from the place of trial and the magistrate certifies to the truth of this averment. The deposition of Meredith was taken in Philadelphia, where he was temporarily, the reason given

in the certificate being that he was going out of the southern district of New York and more than one hundred miles from
57 the place of trial. He was at that time going from Philadelphia to Pittsburgh. His deposition showed that he lived in Boston and more than one hundred miles from the place of trial and did not live in the southern district of New York, and upon the trial it appeared that that was the reason for taking the deposition. These depositions were admitted without calling upon the plaintiff to prove that the witnesses still resided one hundred miles from the place of trial, in accordance with the rule as announced in Whitford *v.* Clark Co., 119 U. S., 522. "When a witness, whose deposition is taken *de bene esse*, under Revised Statutes, sect. 863, lives more than one hundred miles from the place of trial when the deposition is taken, it will be presumed that he continues to live there at the time of trial, and no further proof on that subject need be offered by the party offering the deposition, unless this presumption is overcome by proof upon the other side." The defendant offered no proof upon the subject. The immediate reduction to writing of the stenographer's minutes and the signature of the witnesses to such written depositions were waived by the defendant. The depositions of Westbrook, Corbett, Bassett, McIntyre, Heath and McConnell, were taken by stipulation on the part of the defendant and not in pursuance of section 863. Instead of subjecting the witnesses to the trouble and delay of an examination in court or elsewhere, the defendant stipulated to produce them for examination and that their depositions might be taken in the city of New York. The defendant objected to the testimony of Kingsbury in regard to the receipts at St. Paul from the performances of "After Dark," in January, 1892, and his statement, so far as it was obtained from the statement book kept by Mr. Bixby, is excluded. The testimony, itself, is unimportant, and is not material in value. The four exhibits from newspapers, offered in connection with the testimony of Westbrook, were objected to and are excluded. The pro-
58 gramme offered in connection with the testimony of Corbett, was objected to and is excluded. The whole testimony of Corbett, Bassett, Heath and McConnell was of no value, except the fact contained in the testimony of Bassett and Corbett, that the latter was in New Orleans in September, 1892, with the Brady "After Dark" Company.

The deposition of Robinson was not offered by the plaintiff. The programme offered in connection with Kingsbury's testimony was admitted, because he identifies the programme as the one actually used in 1892 at the opera house in St. Paul.

The testimony of Meredith, "He told me something about having in a contract that he was to play it there" (in Brooklyn), was stricken out upon motion of the defendant.

The rosters or route lists which were shown to witnesses by the plaintiff to refresh their recollection and were filed for identification or were attached to depositions, were not regarded.

The following question to Nanine Palmer: "Do you remember seeing Corbett in New Orleans," and the question to Kingsbury:

"Do you remember a play being performed," &c., were objected to as leading and were excluded. The other objections, which were taken by the defendant and which have not been hereinbefore referred to, to the depositions offered by the plaintiff or to any question or answer thereto, were overruled.

And the costs of the plaintiff having been duly adjusted by the clerk of the court at the sum of three hundred and forty-five dollars and twelve cents ($345.12):

Now, on motion of Olin, Rives & Montgomery, attorneys for the plaintiff, it is

Ordered, adjudged and decreed that Augustin Daly, the plaintiff, do recover of William A. Brady, the defendant, the sum of sixty-three hundred dollars ($6,300), the amount of plaintiff's damages so found by the court as aforesaid, and the further sum of three hundred and forty-five dollars and twelve cents ($345.12) costs and
59 disbursements, amounting in all to the sum of sixty six hun- and forty-five $\frac{12}{100}$ dollars, and that the plaintiff have execution therefor.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. Augustin Daly *vs.* William A. Brady. Judgment. Olin, Rives & Montgomery, attorneys for plaintiff, 32 Nassau street, New York city. U. S. circuit court. Filed Sep. 17, 1896, 11.43 a. m. John A. Shields, clerk.

United States Circuit Court, Southern District New York.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY.

And now, on this day, to wit, May 29, 1895, before the Honorable Nathaniel Shipman, judge, at a circuit court in the city of New York in the southern district of New York came as well the said plaintiff Augustin Daly and his attorneys and counsel, as the said defendant and his attorneys and counsel, and a jury having been waived by stipulation in writing—the said plaintiff being represented by Messrs. Olin, Rives & Montgomery, his attorneys and Stephen H. Olin, as counsel, and the defendant by Messrs. Dittenhoefer, Gerber & James, his attorneys, and A. J. Dittenhoefer and David Gerber as counsel, and the plaintiff, by his counsel having opened the case, and the defendant having moved before any
60 evidence was taken, to compel the plaintiff to elect whether he proceeds upon his first cause of action for damages, or upon his second cause of action, which was predicated upon the statute, for a penalty, and the court having denied the motion, to which an exception was duly taken by the defendant, the plaintiff to maintain the issues on his part, produced and called the following evidence and witnesses, to wit:

Mr. Olin offered in evidence the summons in this action, together

with a certificate of the marshal, showing that the summons was served upon the defendant William A. Brady on the 14th day of July, 1893. Mr. Olin then offered in evidence the præcipe and subpœna in the suit in the circuit court of the United States for the southern district of New York, in which Augustin Daly was plaintiff and Wm. A. Brady and others were defendants, and also offered the whole record of that suit, to show the judgment in regard to the question of copyright and the infringement.

Mr. DITTENHOEFER: We object to the introduction of the evidence on the following grounds:

I. It is a record in an action in equity for an injunction, while this is an action to recover penalties, and a record in an action in equity is not admissible as evidence against a party in an action at law for a penalty. Different evidence is permissible in an action in equity than in an action at law to recover a penalty.

II. In an action in equity a defendant can be made a witness against himself. In an action at law for a penalty he cannot be.

III. As a matter of fact, in this action in equity the defendant Brady was called as a witness on the accounting by the plaintiff and for the plaintiff, and was compelled to testify against himself, although objection was raised, and the result of the evidence
61 taken by him is in that record. The admission, therefore, of that record containing his evidence would be virtually compelling the defendant to be a witness against himself.

IV. The record in that case is an action in equity against three different parties. It is not admissible in this action to recover a penalty against only one of those defendants, the action being only against him.

V. An action for a penalty is a quasi-criminal action. There cannot be any doubt of that under the decision in Callahan *vs.* Meyers, 128 U. S., 417, and analogous cases; and in no criminal action or action of a quasi-criminal character, can a defendant be made a witness against himself, either directly or indirectly. In that record the only proof they have as to the number of performances is the proof given involuntarily by Mr. Brady when called as a witness by the plaintiff, and when thus compelled to testify against himself.

VI. Proof which may be considered sufficient in a suit at equity to establish a fact is not sufficient in a suit at law to recover a penalty, and a different kind of evidence is required. In this action for a penalty, under the statute, the defendant has a constitutional right to a trial by jury and your honor is now sitting as a jury. In an action in equity there is no such right; and this evidence forced out of the defendant by the plaintiff on his subpœna, cannot be used against him.

VII. In the admission and rejection of evidence, as is very familiar to your honor, a different and more liberal view is taken in an action at equity than in an action at law. Indeed, in equity, exceptions as to the admission of evidence are hardly of any
62 avail.

VIII. And then I make the general objection that this record which they now offer is incompetent, immaterial and irrelevant.

This record was admitted for certain purposes, to which ruling defendant then and there duly excepted.

The record in the said equity suit is marked "Plaintiff's Exhibit Record, Daly *vs.* George P. Webster, William A. Brady and Henry C. Miner." The papers offered and admitted in evidence are marked respectively Plaintiff's Exhibits 2, 2 A, 2 B, 2 C, 2 D and 2 E.

The said record is as follows:

Record.

DALY
vs.
WEBSTER ET AL.

Præcipe.

Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
vs.
GEORGE P. WEBSTER, WILLIAM A. BRADY, and HENRY C. MINER. } In Equity.

John A. Shields, clerk circuit court United States, southern district of New York:

You will please issue a subpœna to the defendants Webster, Brady and Miner, in the above-entitled action, returnable on the first Monday of July, 1889.

OLIN, RIVES & MONTGOMERY,
Solicitors for Complainant.

Dated New York, May 20, 1889.

63 *Subpœna.*

The President of the United States of America to George P. Webster, William A. Brady, and Henry C. Miner, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit court, in equity, on the first Monday of July, A. D. 1889, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Augustin Daly, and do further and receive what the said court shall have considered in that behalf, and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, on the

20th day of June, in the year one thousand eight hundred and eighty-nine, of the Independence of the United States the one hundred and thirteenth.

JOHN A. SHIELDS, *Clerk.*

OLIN, RIVES & MONTGOMERY,
Complainant's Solicitors.

The defendants are required to enter appearance in the above cause in the clerk's office of this court, on or before the first Monday of July, 1889, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

64 PLAINTIFF'S EXHIBIT 1 A.

Bill of Complaint.

Circuit Court of the United States for the Southern District of New York. In Equity.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Augustin Daly, of the city of New York, a citizen of the State of New York and of the United States, brings this his bill of complaint against George P. Webster, a citizen of the State of ——, and William A. Brady, a citizen of the State of ——, and Henry C. Miner, a citizen of the State of New York, as defendants, and thereupon your orator complains and says:

That he is by profession a dramatic author and has been for several years past engaged in the business of composing, writing and producing on the theatrical stage in the city of New York and other cities of the United States dramatic compositions commonly called plays.

And that the defendants George P. Webster and William A. Brady are engaged in giving theatrical representations at different theatres in the United States, and advertise such representations at the People's theatre, a public place of theatrical amusement in the city of New York, and are copartners in such business, composing the firm of Webster & Brady.

That before the first day of August, 1867, your orator invented, composed and wrote a dramatic composition called "Under
65 the Gas Light, a romantic panorama of the streets and homes of New York, in five acts."

That said dramatic composition, and each and all of the incidents and scenes therein were the original conception and invention of your orator, and said composition in dialogue, scenery, characters, incidents and dramatic and theatrical effect was wholly original with your orator and was designed and suited for public representation.

That on the first day of August, 1867, your orator, being then a citizen and resident of the United States of America, and being then the author and the sole and exclusive proprietor and owner of the

said dramatic composition, and the said composition then never having been printed, published, acted, performed or represented, took out a copyright therefor in the said United States by depositing a printed copy of the title of said composition in the clerk's office of the district court of the United States for the southern district of New York, in which district your orator then and long before resided, and in all respects complied with the provisions of the existing acts of Congress relating to copyrights, which acts are hereinafter particularly mentioned, and received from said clerk, who then and there recorded the said title as required by said acts, a certificate and record in the form required by such acts, containing the title of said composition, and the paper hereto annexed marked A is a true copy of such certificate and record and of the record duly made by said clerk in that behalf, which said paper your orator prays may be taken as a part of this, his bill.

And your orator further shows that subsequently to said last-named date he caused the said composition to be printed and published, and within three months from the date of such printing and publication, he caused a printed copy of said composition so printed and published to be delivered to and deposited with the clerk of the said district court, and also to be delivered to and deposited
66 in the library of Congress at Washington for the use of said library, as required by said acts of Congress.

And your orator gave information of the copyright of said composition being secured to him, by causing to be printed and inserted in the several copies of each and every book and edition of such book or composition so published and printed on the title page thereof, or on the page immediately following, the following words, viz: "Entered according to act of Congress, in the year 1867, by Augustin Daly, in the clerk's office of the district court of the United States for the southern district of New York," and complied with all the provisions of said acts of Congress necessary to secure the benefit of said acts of Congress to your orator.

And your orator shows that in and by the aforesaid proceedings of your orator, he intended to obtain, hold and possess and did thereby obtain, hold and possess, and now holds and possesses by virtue of the act of Congress approved February 3, 1831, and the acts amendatory thereof and supplementary thereto, not only the sole and exclusive right and liberty to print and publish such dramatic composition and book, but also the sole and exclusive right to act, perform or represent the said dramatic composition or play and to cause it to be acted, performed or represented on any stage or public place during the whole period for which said copyright was obtained.

And your orator further shows that the said dramatic composition was produced, performed and represented for the first time in any place or any stage on the 12th day of August, 1867, under his direction and for his benefit at the New York theatre, a public place of theatrical amusement in the city of New York, and was there and thenceforward represented for eight consecutive weeks and met with great favor and success, attracting crowds of per-

sons and being pecuniarily profitable to your orator to a large amount and gained for your orator wide fame as the author thereof. And that since the twelfth day of August,
67 1867, aforesaid, the said play of "Under the Gaslight" has been very frequently represented in cities in all parts of the United States upon the stage, and has been produced both by this complainant and by other persons under his license, and has been a very successful and popular play, and has been seen by great numbers of persons, and that your orator has received as profit from the production of said play, and as fees from different persons performing the same under his license, very large sums of money in each and every year from the year 1867 aforesaid to the present time.

That the cause of such success, fame and profit was the originality and extraordinary novel nature of the principal scenes and incidents of said composition and particularly the scene and incident in the end of the third scene of the fourth act of said composition, commonly called (after being so publicly performed) the railroad scene or sensation in which one of the characters in the said composition is represented as secured by another of the characters and laid helpless upon the rails of a railroad track in such a manner and with the presumed intent that the railroad train momentarily expected shall run him down and kill him, and just at the moment when such a fate seems inevitable, another of the characters in the composition contrives to reach the intended victim and to drag him from the track as the train rushes in and passes over the spot.

And your orator shows that this incident and scene was entirely novel and unlike any dramatic incident known to have been heretofore represented on any stage, or invented by any other author before your orator invented and composed the same in his said composition, and produced and represented the same as aforesaid.

And the said railroad scene or sensation was as soon as produced and represented by your orator, and ever since has been and is now regarded, whenever it has been witnessed, to be one of the
68 most novel, startling and attractive incidents ever represented on the public stage.

That the playing of said composition and of said railroad scene or sensation, caused the same to become famous in all parts of the United States and Canada and in England, and the said composition was repeatedly produced and represented by and for the advantage of your orator in many cities and towns of the United States and Canada; and everywhere to the great profit of your orator.

And your orator shows that the chief value of said composition, and its popularity depend upon the said railroad scene or sensation contained in it, and upon the representation of said scene in said composition only, and in no other dramatic composition whatever.

And the printed book hereto annexed "B" is a true copy of the whole of said composition, and the said railroad scene is found at pages 42 and 43 of said book, and your orator prays that the said printed book may be taken and regarded as a part of this his bill.

And your orator further shows that soon after such production

and representation and printing of said composition in the United States, one Dion Boucicault, a dramatic author and actor and theatrical manager, a native and subject of Great Britain, as your orator believes, and residing in England, procured a copy of said composition by some means, and without the knowledge, privity or consent of your orator, prepared therefrom a play which he called "After Dark," in which said play said Boucicault, in order to make it attractive and to gain pecuniary profit therefrom, introduced several of the scenes and incidents of your orator's said composition, varying them all slightly but following in them the inventions and plan of your orator's said composition in a manner which was intended to differ from it only slightly so as colorably to be a different work when it substantially retained the attractive features of your
69 orator's said composition, and among other scenes included the said railway scene of your orator's play, substituting for the surface railroad an underground railroad; for the rescue of the victim to be killed on the railroad, a man for a woman, and for the railroad station in which the rescuer was confined, a cellar, and for the breaking down a door to escape and rescue the victim, the breaking down a door in a wall; and that Henry D. Palmer and Henry C. Jarrett, citizens of the State of New York, made preparations to produce the said play of "After Dark," by Dion Boucicault, at a theatre in the city of New York; that thereafter your orator presented to the United States circuit court, in the second circuit, for the southern district of New York, in equity, his certain bill of complaint alleging the foregoing facts, and prayed for an injunction restraining the defendants from performing your orator's railroad scene in his play of "Under the Gas Light" in the said drama called "After Dark;" that a motion by your orator for a provisional injunction was duly made in said circuit court for the southern district of New York, and the same having been duly heard and considered, the injunction prayed for by your orator was granted, and the said Palmer and Jarrett were enjoined and forbidden from the public performance or representation of the railroad scene in the play "After Dark," or of any scene in substance the same as the railroad scene in either of the two plays.

That after the said decision of the said circuit court for the southern district of New York, your orotor has from time to time received from persons performing the said play of "After Dark," by Dion Boucicault, in different cities of the United States, royalties for the use of the said railroad scene, and has also received from other persons performing different plays and dramas, in which was a railroad scene imitated from or like the railway scene in the
70 said play of "Under the Gas Light," large sums of money as royalties for permission and license to use such scenes.

And your orator further shows that at the present time the defendants George P. Webster and William A. Brady, with full knowledge of your orator's rights in the aforesaid drama and the aforesaid scene, having been in divers cities of the United States producing the said play of "After Dark," and using and producing said railway scene in "After Dark," and several of the scenes and incidents

of your orator's play, varying them slightly, but following the plan of your orator's play in a manner which was intended to differ from it only slightly, so as colorably to be a different work, while substantially retaining the attractive features of your orator's play, and representing with only colorable variations, the said railroad scene of your orator's play, representing a railroad running underground in the city of London, substituting for the victim to be killed on the railroad a man tied by a rope, and suspended from an aperture in the top of the tunnel and hanging over the rail, where he would be struck by the engine, instead of a man tied and laid upon the track, as in your orator's said play, and for the rescuer of the victim to be killed on the railroad a man shut up in a wine cellar and breaking his way through a window or wall into the tunnel, instead of breaking a way out of a switch-tender's house, as in your orator's said play; that the said scene in the play "After Dark" as written by the said Dion Boucicault and produced by the defendants, is a palpable imitation of your orator's said railroad scene, and is plagiarized therefrom and put into the play of "After Dark," by the said defendants for the purpose of obtaining the pecuniary benefit which might otherwise result to your orator from the representation of his play.

And your orator further shows that the said play of "After
71 Dark" has been performed by the defendants, Webster and Brady, in different parts of the United States without your orator's consent, to the great profit of the defendants, Webster and Brady, and was indebted for its success and profit to the imitation of the said railway scene; that the said defendants, Webster and Brady, have organized a company to perform the said play of "After Dark," with the said railroad scene, in different cities of the United States; that they have agreed and confederated with the defendant Henry C. Miner to produce the said play in the city of New York, and that the defendants are intending and have announced their purpose to perform such play of "After Dark" publicly on the stage at a theatre in the city of New York, in the southern district of New York, to wit, The People's Theatre, during the week beginning on the 20th day of May, 1889, without the consent of your orator; that such play and plagiarism of the said railroad scene has recently been performed, as your orator is informed and believes, at a theatre in the city of Philadelphia, in the State of Pennsylvania, to wit, The National Theatre.

And your orator further shows that the performance of the said play of "After Dark" at different cities where the play of "Under the Gas Light" is about to be performed seriously injures your orator and lessens the value of the said play of "Under the Gas Light," and diminishes the accounts to be received by your orator from the licensing of the said play, and that such injury cannot be accurately ascertained and computed, and the compensation therefor cannot be made by damages, and that your orator, by reason of the said performance of the said play by the defendants, and by their announcement and advertisement thereof, with the said railroad scene therein, is irreparably damaged.

All of which actings, doing, and pretenses are contrary to equity and good conscience, and tend to manifest wrong and injury of your orator in the premises.

72 In consideration whereof, and inasmuch as your orator can only have relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, and to the end that the said defendants may, if they can, show why your orator should not have the relief thereby prayed, and may true, full, and perfect answers make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were here repeated, and they thereto severally and specifically interrogated, and that the said defendants be decreed to render a full and true account to your orator of all money and profits received from or by reason of the said performances of the said play of "After Dark," and of the railroad scene therein, and that the said defendants may be enjoined and restrained from performing the said play or the said railroad scene, or any other colorable imitation or adaptation of your orator's said play of "Under the Gas Light," and from advertising or representing the same; and in order that your orator may have such other and further relief as may be just, may it please your honors to grant unto your orator the writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said George P. Webster, William A. Brady and Henry C. Miner, commanding them and each of them, on a day therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform and abide such further order, direction, and decree as may be made against them and each of them.

And may it please your honors to grant unto your orator the writ of injunction, issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, directed to the said George P. Webster, William A. Brady, and Henry C. Miner,

73 defendants, commanding, enjoining, and restraining them, the said defendants and each of them, and their servants, attorneys, agents, and representatives, from performing the said play of "After Dark," or any other colorable imitation or representation thereof, or of the railroad scene therein, or of your orator's said play of "Under the Gas Light," or of the railroad scene in said play, and from advertising or announcing any representation or performance thereof.

OLIN, RIVES & MONTGOMERY, *Solicitors.*

STEPHEN H. OLIN, *Of Counsel.*

STATE OF NEW YORK, }
City and County of New York, } ss:

Augustin Daly, being duly sworn, says: That he is the complainant named in the above bill; that he has read the same and is acquainted with the facts therein stated; that said bill and the

matters therein stated are true to the knowledge of deponent, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

AUGUSTIN DALY.

Sworn to before me this 19th day of May, 1889.

GEO. B. HEATH,
Notary Public, N. Y. Co.

74-121 (COPY EXHIBIT "A.")

[SEAL.]

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that on the first day of August, anno Domini 1867, Augustin Daly, of the said district has deposited in this office the title of a book or dramatic composition, the title of which is in the words following, to wit:

Under the Gas Light.

A romantic panorama of the streets and homes of New York,

by

Augustin Daly,

Author of "Leah the Forsaken," "Griffith Gaunt," "Taming a Butterfly," &c., the right whereof he claims as author and proprietor.

In conformity with an act of Congress, entitled "An act to amend the several acts respecting copyrights."

(Signed) GEO. F. BETTS,
Clerk of the Southern District of New York.

Exhibit B is a copy of the play published by the complainant, as follows:

122 PLAINTIFF'S EXHIBIT 1 B.

Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
vs.
GEORGE P. WEBSTER, WILLIAM A. BRADY, and HENRY C. MINER.

The Answer of George P. Webster and William A. Brady, Defendants, to the Bill of Complaint of Augustin Daly, Complainant.

This defendant now and at all times hereafter saving and reserving unto himself all the benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties

and other imperfections in the said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant for answer*ing*, saith:

1. That he has no knowledge or information sufficient to form a belief as to whether the complainant did, on the first day of August, 1887, or at any time invent, compose and write a dramatic composition called "Under the Gas Light," a dramatic panorama of streets and homes of New York, in five acts, or as to whether said dramatic composition, or whether each or all or any of the scenes and incidents therein were originally the conception and invention of said complainant, or as to whether said composition, in
123 dialogue, scenery, characters, incidents, and dramatic and theatrical effect, or in any of these, was wholly or in any respect original with said complainant, or as to whether on the first day of May, 1867, said complainant was a citizen of the United States of America, or was author or sole or exclusive proprietor or owner of said dramatic composition, or as to whether said composition had, at or before said date, been printed, published, performed or represented, or as to whether on said date, or at any time, said complainant took out a copyright therefor in said United States, or whether on said date, or at any time, he deposited a printed copy of the title of said composition in the clerk's office of the district court of the United States for the southern district of New York, or as to whether said complainant resided in said district at said time, or long before, or as to whether the said complainant, in all or any respect, complied with the provisions of the existing acts of Congress relating to copyrights, or as to whether the said clerk then and *or* there, or at any time recorded said title, or as to whether complainant received from said clerk a certificate and record in the form required by the acts of Congress, or whether said certificate contained the title of said composition, or as to whether the paper annexed to the bill, marked A, is a true copy of said certificate and record, and of the record made by said clerk in that behalf, or as to whether the said complainant subsequently to said last-named date, or at any time, caused said composition to be printed or published, or as to whether said complainant, within three months from said date, printed and published, or at any time caused to be printed a copy of said composition to be delivered to and deposited with the clerk of said district court or to be delivered and deposited in the Library of Congress at Washington, or as to whether the complainant gave information of the copyright of said composition being secured to him by causing to be printed and inserted in the several
124 copies of each book or composition, on the title page thereof, or on the page immediately following words, to wit: "Entered according to an act of Congress, in the year 1867, by Augustin Daly, in the clerk's office of the United States district court for the southern district of New York."

Or as to whether said complainant complied with any or all the provisions of said acts of Congress necessary to secure said benefits of said acts of Congress to said complainant, or as to whether said

complainant did, by said proceedings, intend to obtain, hold and possess, and said defendant, therefore, denies each and every of said allegations.

2. The said defendant denies, upon information and belief, that the said complainant did obtain, hold and possess, or now holds and possesses, by virtue of the acts of Congress approved February 3rd, 1881, and the acts amendatory thereof and supplementary thereto, or by any of them, the sole and exclusive or any right or privilege to print and publish such dramatic composition and book, or the sole and exclusive or any right to act, perform and represent the said dramatic composition or play, or cause it to be acted, performed or represented on any stage or public place during the whole period for which said copyright was obtained, or that he holds and possesses any of said rights.

3. This defendant has no knowledge or information sufficient to form a belief as to whether said dramatic composition was produced, performed and represented for the first time in any place or on any stage, on the 12th of August, 1867, under said complainant's direction or otherwise, and for his benefit, at the New York theatre, in the city of New York, or was thereafter represented for eight consecutive weeks, or that the same met with much favor and success, or attracted crowds of persons, or was a pecuniary profit to said complainant to a large or to any amount, or gained for said plaintiff fame as the author thereof, or that since the 12th of Au-
125 gust, 1867, the said play "Under the Gas Light" has frequently been represented in cities in all parts of the United States upon the stage, or has been produced by the said complainant, or by other persons under his license or has been a very successful or popular play, or has been seen by a great number of persons, or that said complainant has received as profits from the production of said play, or fees from persons performing under his license a very large sum of money in each or any year from the year 1867, or that the cause of said success, fame and profit was the originality or extraordinary novel nature of the principal scenes and incidents of the said composition or of the scene and incident in the third scene of the fourth act of said composition known as the railroad scene or sensation or that the said incident as set forth in said complaint was entirely novel and unlike any dramatic incident theretofore known to have been represented on any stage or invented by any author before the said complainant inserted the same in his said composition or produced and represented the same, or that the said railroad scene or sensation was, as soon as produced and represented by the said complainant or has ever since been or is now regarded whenever it is witnessed to be one of the most novel, startling and attractive incidents represented on any public stage, or that the said dramatic composition or of the said railroad scene or sensation caused the same to become famous in all parts of the United States, Canada and England, or that the said play or dramatic composition was repeatedly produced and represented by and for the advantage of said complainant in any of the States, cities and towns of the United States or everywhere to the great or any profit

of the said complainant, or that the chief value of the said composition or its popularity depend upon said railroad scene or sensation, or upon the representation of said scene in said composition only, and he therefore denies each and every of said allegations.

Said defendant, upon information and belief, denies that
126 Dion Boucicault, mentioned in said bill of complaint, procured a copy of said composition, or prepared therefrom the play called by said Boucicault "After Dark," or that said Boucicault introduced in said play "After Dark" several or any of the scenes and incidents of said complainant's composition "Under the Gas Light," or that he so introduced, or that he followed the invention or plan of said complainant's composition in any manner whatever, or that he colorably or otherwise, took from said complainant's composition any of the scenes and incidents, and he denies each and every of said allegations.

4. Defendant, upon information and belief, denies that the railroad scene in the play or dramatic composition of Dion Boucicault, entitled "After Dark," was taken by said Boucicault colorably or otherwise, or copied or imitated in any way from the said play "Under the Gas Light." And upon information and belief, this defendant alleges that said Boucicault had not read nor seen complainant's dramatic composition "Under the Gas Light," or any part or portion thereof, or any scene, situation, incident, dialogue, or business of said dramatic composition at the time he, the said Boucicault, invented and composed his said dramatic composition "After Dark."

6. That the said Dion Boucicault was not a party to the proceedings alleged in said complaint, in which the complainant herein was plaintiff and Henry D. Palmer and Henry C. Jarrett were defendants, and that the said Boucicault did not appear in said proceedings or make any affidavit or present any proof, and that he was not called upon to make any affidavit or present any proof in said proceedings.

7. This defendant had no knowledge or information suffi-
127 cient to form a belief as to whether said complainant, from time to time after the decision in said proceedings set forth in said complaint, received from the persons performing said play "After Dark" by Dion Boucicault, or from any of them in different cities of the United States or in any of said cities, royalties, or any royalty for the use of said railroad scene, or as to whether said complainant has received from other persons performing different plays and dramas in which was the railroad scene imitated from or like the railroad scene in the said play "Under the Gaslight," large or any sums of money as royalty for permission or license to use said scene, and he therefore denies the same.

8. The said defendant denies that at the present time or at any time the defendants herein, George P. Webster and William A. Brady, or either of them, with full or any knowledge of complainant's rights in the drama "Under the Gaslight," and in the said railway scene have been producing in the said play "After Dark" the railway scene, and he denies that the said defendants have produced

in said play several other scenes, several of the scenes and incidents of the complainant's play, or have varied the said scenes and incidents slightly or in any respect, or have followed the plan of complainant's play in a manner, or have colorably or in any respect varied any of the scenes and incidents of the complainant's play in the said composition "After Dark," or that they have substantially or in anywise retained the dramatic features of complainant's said composition and represented the same with colorable variations.

Upon information and belief this defendant denies that the scene in the play "After Dark," as set forth in said bill of complaint or otherwise, is a palpable imitation or any imitation of the railroad scene in complainant's dramatic composition "Under the Gaslight,"
128 or was plagiarized therefrom or put into the play "After Dark" by the said defendants, or either of them, for the purpose of obtaining pecuniary benefit which might result to complainant from the representation of his said play, and he alleges, upon information and belief, that the said railway scene in the said play "After Dark," as produced by the said defendant, was invented and composed by the said Dion Boucicault without any aid or assistance whatever from the railway scene in the said complainant's production, and without having been seen or read by the said Dion Boucicault, and without any knowledge on the part of said Boucicault of the said railway scene in said dramatic composition of said complainant.

10. This defendant denies that the said play "After Dark," has been performed by the said defendants to their great profit, or that it was noted for its success and profit to any imitation of the said railway scene in complainant's dramatic composition.

11. They admit that they agreed with said Henry C. Miner to produce the said play, "After Dark," at the People's theatre in the city of New York, and allege that the railway scene as produced in said play, "After Dark," at said People's theatre from the first day of its production at said theatre and every night thereafter, is as follows, and not otherwise:

One of the characters, Gordon Chumley, comes to the concert hall of Dicey Morris, known as the Elysium, by appointment, in order to take up from Chandos Bellingham a forged draft of his friend, Sir George Medhurst. After paying the money, he drinks some wine which is drugged, and then Morris and Bellingham put him through a trap-door, supposed to lead to the cellar which leads to the tunnel of an underground railway. The following scene shows the cellar, and then follows the scene of a tunnel, with railroad
129 tracks and a switch. Gordon Chumley is seen walking along the tracks in a dazed condition from the effects of the drug, and the sound of an approaching train is heard. Old Tom, who was in the Elysium at the time Chumley took up the draft, and who was also thrown into the cellar, yells at Chumley. While staggering along in a dazed condition he unconsciously falls against the switch handle, throws the switch, and the train passes on to the other track. The engineer noticing something wrong, whistles

down brakes, and the train stops without crossing the stage, and the curtain falls.

12. That said scene is in no way similar to the scene in the complainant's alleged copyrighted play, excepting that the scene represents railroad tracks and the appearance of an engine upon the stage. None of the scenes leading up to or surrounding the scene in complainant's alleged play are presented or in any way suggested by the play "After Dark" or the said scene. That the said play "After Dark" is, in every instance, and in character, incident, plot, *motif*, business and dialogue as widely different from the complainant's play as two plays possibly can be, and one in no way suggests the other.

13. The said play, "After Dark," was produced at the National theatre in the city of Philadelphia, with a scene containing an underground railroad, and one of the characters, Gordon Chumley, suspended from an aperture in the top of the tunnel hanging over the rail; but the said railway scene as produced in Philadelphia was not produced at the People's theatre in the city of New York, but the railway scene as produced in said theatre in the city of New York was and is as hereinbefore described.

14. The said defendant denies that the said performance of the play "After Dark" where "Under the Gaslight" is performed, seriously or in anywise injures said complainant and lessens the value of said play "Under the Gaslight," or diminishes the amount to be received by said complainant from the licensing of said play, and that such injury cannot be accurately or in anywise ascertained or computed, or that compensation therefor cannot be made by damages, or that the said complainant has been or is irreparably damaged by reason of the performances of said play "After Dark" by the defendants, or by the announcement or advertisement thereof with the said railway scene therein or otherwise.

15. As and for a further and separate answer and defense this defendant alleges upon information and belief that the incident of a railroad scene upon the stage and the rescue of one of the characters in the play from being killed by the train is not new or original with the complainant. That as early as 1843 this defendant alleges, upon information and belief, a play was performed in London, England, known as the "Scamps of London," written by W. J. Moncrieff, purporting to be founded upon the French play "Les Bohemiens," in which first-named play the third act of scene three represents a railway; Devereau, one of the characters, drugs Louisa and places her body across the railway track. The sound of the train is heard just as her father, who had been stabbed, returns to consciousness and saves his daughter by pulling her off the track just as the train dashes from the tunnel and crosses the stage. That the said play was repeatedly performed thereafter, as defendant alleges upon information and belief, and that it has been printed and is for sale publicly in the city of New York and elsewhere, and has been for a long number of years and among others, has been published by Samuel French, of London, and Samuel French & Son,

of New York, publishers of complainant's alleged play—to which play, the "Scamps of London," defendants beg leave to refer as part of their answer.

131 16. As and for a further and separate answer and defense these defendants reiterating, reasserting and realleging the allegations contained in the 15th paragraph hereof, further allege that the said book and play, "Scamps of London," has been published in this country and in London, and dedicated to the public, and has been sold and distributed for a number of years, with the description of the scene of a railroad and the rescue of a character from destruction, which publication has continued for years, with the knowledge of complainants, as defendants allege upon information and belief, and without any interference by them therewith, and that the said complainant has abandoned and lost whatever rights he may have had to the said scene by abandonment and laches, by reason of publication of the said play.

And this defendant denies all the said bill charged, without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein well and sufficiently answered, confessed, traversed or denied, is not true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

GEORGE P. WEBSTER,
WM. A. BRADY,
Defendants.
A. J. DITTENHOEFER,
Solicitor for Defendants.

132 PLAINTIFF'S EXHIBIT 1 C.

Complainant's Replication to Answer of Defendants George P. Webster and William A. Brady.

Circuit Court of the United States, Southern District of New York.

AUGUSTIN DALY
vs.
GEORGE P. WEBSTER, WILLIAM A. BRADY, and HENRY C. MINER.

The replication of Augustin Daly, complainant, to the answer of Webster and Brady, defendants.

This repliant saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain and prove his said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer

of said defendants is uncertain, untrue and insufficient to be replied unto by this repliant. Without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain and prove as this honorable court
133 shall direct, and humbly prays as in and by his said bill he has already prayed.

OLIN, RIVES & MONTGOMERY,
Complainant's Solicitors.

PLAINTIFF'S EXHIBIT 1 D.

Complainant's Replication to Answer of Defendant Henry C. Miner.

Circuit Court of the United States, Southern District of New York.

AUGUSTIN DALY
vs.
GEORGE P. WEBSTER, WILLIAM A. BRADY, and HENRY C. MINER.

The replication of Augustin Daly, complainant, to the answer of Henry C. Miner, defendant.

This repliant, saving and reserving unto himself now — at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto says, that he will aver and maintain and prove his said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of said defendant is uncertain, untrue and insufficient to be replied unto by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied,
134 is true; all which matters and things this repliant is and will be ready to aver maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

OLIN, RIVES & MONTGOMERY,
Complainant's Solicitors.

On the commencement of the said suit, a motion was made by the complainant for an injunction *pendente lite*, which was denied, and the following order entered on the 20th day of July, 1889.

DEFENDANTS' EXHIBIT B.

At a stated term of the United States circuit court for the southern district of New York, in the second circuit, held at the court-

house in the city of New York, on the 20th day of July, in the year of our Lord, one thousand eight hundred and eighty-nine.

Present: Hon. William J. Wallace, justice.

AUGUSTIN DALY, Complainant,
against
GEORGE P. WEBSTER, WILLIAM A. BRADY, and HENRY C. MINER, Defendants.

A motion coming on regularly to be heard upon an order to show cause heretofore granted herein, why the defendants should
135 not be enjoined and restrained from performing the play "After Dark," or the railroad scene therein, or any other colorable imitation or adaptation of "Under the Gas Light," and from advertising or representing the same, and for such other relief pursuant to the bill of complaint in the above-entitled action.

Now, on reading and filing the bill of complaint, and the affidavits of Harold Swayne, in support of said motion, and after reading and filing the affidavits of Arthur McKee Rankin, Dion Boucicault and William A. Brady, and the answer of George P. Webster and William A. Brady to the bill of complaint herein; and after hearing Stephen H. Olin, Esq., solicitor for plaintiff in support of said motion, and A. J. Dittenhoefer, solicitor for defendants Webster and Brady in opposition thereto, it is, on motion of A. J. Dittenhoefer, solicitor for defendants Webster and Brady—

Ordered, that the said motion be, and the same hereby, is in all respects denied.

WILLIAM J. WALLACE.

136 DEFENDANTS' EXHIBIT C.

On final hearing the following decree was made:

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the court-house, in the city of New York, on the 26th day of October, 1891 (October term, 1891).

Present: Hon. A. C. Coxe, district judge, sitting in equity.

AUGUSTIN DALY, Complainant,
against
GEORGE P. WEBSTER and WILLIAM A. BRADY, Impleaded with Henry C. Miner, Defendants. } In Equity.

This cause having come on to be heard on final hearing,

On the bill of complaint herein, the answers filed by the defendants herein, the replication of the complainant to such answers, and the proofs, oral, documentary and written, taken and filed in said cause, and the said cause having been duly argued, orally and upon written arguments, by Stephen H. Olin, of counsel for the complainant, and A. J. Dittenhoefer, of counsel for the defendants:

137 Now therefore, in consideration thereof, it is ordered, adjudged and decreed that the bill of complaint be, and the same hereby is dismissed upon the merits thereof, with costs to the defendants Webster and Brady herein to be taxed and inserted by the clerk of this court.

(Signed) ALFRED C. COXE, *U. S. J.*

From this decree, the complainant in said equity suit appealed to the United States circuit court of appeals for the second circuit, which court, on the 5th day of November, 1892, issued its mandate as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of New York, Greeting:

Whereas lately, in the circuit court of the United States for the southern district of New York, before you or some of you, in a cause between Augustin Daly, complainant, against George P. Webster, William A. Brady and Henry C. Miner, defendants, wherein the decree of the said court is in words and figures following, viz:

This cause having come on to be heard on a final hearing on the bill of complaint herein, the answers filed by the defendants herein, the replication of the complainant to such answers and the proofs, oral, documentary and written taken and filed in said cause, and the said cause having been duly argued, orally and upon written arguments, by Stephen H. Olin, of counsel for the complainants, and A. J. Dittenhoefer of counsel for the defendants:

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed, that the bill of complaint be and the same
138 hereby is dismissed upon the merits thereof, with costs to the defendants Webster and Brady herein, to be taxed and inserted by the clerk of this court.

(Signed) ALFRED C. COXE, *U. S. J.*

as by the inspection of the transcript of the record of the said court, which was brought into the United States circuit court of appeals, for the second circuit, by virtue of an appeal taken out by the said Augustin Daly, complainant and appellant, agreeably to the act of Congress in such case made and provided, fully and at large appears:

And, whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said United States circuit court of appeals for the second circuit, on the said transcript of record, and was argued by counsel;

On consideration whereof, it is ordered, adjudged and decreed by this court, that the said final decree of the circuit court of the United States for the southern district of New York, and any and

all judgments entered therein, be and the same hereby is reversed, and the said circuit court of the United States for the southern district of New York, is hereby instructed to enter the usual decree for account and perpetual injunction, with costs to the complainant-appellant and against the defendants-respondents, in the said circuit court and in this court, all in accordance with the opinion of this court;

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the opinion of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice
139 of said Supreme Court, the 27th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Costs of—	
Clerk	$18.15
Printing record	267.24
Printing briefs	31.10
Attorney	20.00
	$336.49

JOHN A. SHIELDS,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

In accordance with said mandate, a decree was entered in words and figures as follows:

PLAINTIFF'S EXHIBIT 2 A.

At a stated term of the circuit court of the United States of America for the southern district of New York in the second circuit, held at the court-house, in the city of New York, on the 5th day of November, 1892.

Present: The Hon. E. Henry Lacombe, circuit judge.

AUGUSTIN DALY, Complainant,
against
GEORGE P. WEBSTER and WILLIAM A. BRADY, Impleaded, &c., Defendants.

This cause having been heard upon appeal before the
140 United States circuit court of appeals for the second circuit upon the transcript of the record sent up from this court, and a mandate of the said circuit court of appeals having been filed in this court directing that the decree of this court heretofore entered on the 14th day of November, 1891, be reversed, and that the usual decree for account and perpetual injunction be entered by this court with costs of both courts to said complainant;

Now, upon the said mandate and upon all the pleadings and pro-

ceedings herein, and on motion of Olin, Rives & Montgomery, solicitors for the complainant, it is

Ordered, adjudged and decreed that the decree of the circuit court of appeals be, and the same hereby is made the decree of this court, and that the final decree of this court in this cause, entered on the 14th day of November, 1891, be and the same hereby is reversed.

And it is further ordered, adjudged and decreed that the copyright of the dramatic composition entitled "Under the Gaslight," obtained on the first day of August, 1867, by Augustin Daly, being the copyright referred to in the bill of complaint herein, is good and valid.

That the said Augustin Daly is the author of the dramatic composition entitled "Under the Gaslight," as described and claimed in said copyright, and is the whole and exclusive proprietor and owner of said dramatic composition.

That the said Augustin Daly is the originator of the railway scene as used in said dramatic composition entitled "Under the Gaslight," and that said railway scene is covered and protected by the said copyright.

That the said George P. Webster and William A. Brady impleaded, the defendants herein, have disregarded said copyright and violated the exclusive rights of the complainant under the same—that is to say, by producing a colorable imitation of said "Under the Gaslight" entitled "After Dark," and by using
141 and producing the railway scene as copyrighted in the dramatic composition entitled "Under the Gaslight" and in divers ways violated said complainant's rights under the copyright obtained by him on the dramatic composition entitled "Under the Gaslight" as charged in said bill of complaint.

And it is further ordered, adjudged and decreed that the said complainant recover of the said defendants his costs, charges and disbursements in this suit, both in the circuit court of appeals, as taxed at $336.49 and in this court, as taxed at $629.59 and that the said complainant have execution for such costs.

And it is further ordered, adjudged and decreed that it be referred to John E. Ward, Esq., one of the masters of this court, residing in the city of New York, to ascertain, take, state and report to the court an account of the number of times the said railway scene was used, produced by said defendants, without the sanction and authority of said complainant, in said dramatic composition entitled "After Dark," and where each and every of such unauthorized performance and production took place and the terms and agreements under which said unauthorized performance took place.

And it is further ordered, adjudged and decreed that the complainant on such accounting have the right to cause an examination of said defendants and each of them, their agents or servants *ore tenus* or otherwise, and also the production of all books, vouchers and documents of said defendants, their agents or servants, and that the said defendants, their agents or servants, attend for such purpose before said master from time to time, as said master shall direct.

And it is further ordered, adjudged and decreed, that a perpetual injunction be issued in this suit against the said defendants, restrain-

ing them, their agents, servants and all claiming or holding under or through them, from producing or performing the dramatic composition entitled "Under the Gaslight" or any colorable imi-
142 tation or representation thereof, or of producing or using or in any manner, adapting or applying the railway scene as used in the dramatic composition entitled "Under the Gaslight" in any other dramatic production and from advertising or announcing any performance or representation of said dramatic composition entitled "Under the Gaslight" or of said railway scene therein, pursuant to the prayer of the said bill of complaint.

E. HENRY LACOMBE.

PLAINTIFF'S EXHIBIT 2 B.

United States Circuit Court, Southern District of New York.

AUGUSTIN DALY, Complainant,
vs.
GEORGE P. WEBSTER and WILLIAM A. BRADY, Impleaded, &c., Defendants.

To the honorable the circuit court of the United States for the southern district of New York, in the second circuit:

I, John E. Ward, one of the masters of this court, residing in the city of New York, to whom by an order, judgment and decree made and entered in this court on the 5th day of November, 1892, this case was referred "to ascertain, take, state and report to this
143 court an account of the number of times the said railway scene was used and produced by said defendants, without the sanction and authority of said complainant, in said dramatic composition entitled 'After Dark,' and where each and every of such unauthorized performances and productions took place, and the terms and agreements under which said unauthorized performances took place," respectfully report to this court:

I. That in compliance with the order, judgment and decree of this court the complainant has caused the defendant William A. Brady, impleaded therein with George P. Webster, to appear before the said master. for examination, and that he has been examined and his testimony reduced to writing and is herewith submitted to the court; that he also produced the books, vouchers and other documents required by the complainant to be produced at the aforesaid hearings, and that the said William A. Brady attended before me from time to time as he was directed.

II. I have ascertained and taken the number of times the said railway scene was used and produced by the said defendants without the sanction and authority of the said complainant in said dramatic composition entitled "After Dark," and I respectfully report that the number of times the said railway scene was so used and produced was (747) seven hundred and forty-seven.

III. I further respectfully report, that the dramatic composition entitled "After Dark" was played at the places and times as follows:

1889:
Bridgeport, Connecticut, August 12th and 13th.
Hartford; 14th and 15th.
Lynn, Massachusetts, 16th and 17th.
Boston; August 19th to 24th.
Baltimore; August 26th to 31st.
144 Washington; Harris' theatre; September 2d to 7th.
Richmond, Virginia; August 9th, 10th, and 11th; Mozart academy.
Lynchburg; 12th; opera-house.
Knoxville; 13th and 14th; opera-house.
Chattanooga, Tennessee; September 16th and 17th; opera-house.
Atlanta; 18th and 19th.
Athens; Georgia; 20th.
Augusta, Georgia, 21st.
Charleston, South Carolina; 23rd and 24th.
Savannah, Ga., 25th and 26th.
Macon, Ga., 27th and 28th.
Columbus, Ga., 30th.
Birmingham, Alabama, October 1st and 2nd.
Selma, Alabama, October 3rd.
Mobile, Alabama, 4th and 5th.
New Orleans, La.; October 6th to 12th.
New Iberia, La., 13th.
Galveston, Texas; 14th and 15th.
Houston, Texas, 16th and 17th.
San Antonio, Texas; 19th and 20th.
Austin, Texas, 21st and 22nd.
Waco, 22nd.
Fort Worth, Texas, 23rd.
Dallas, Texas; 24th, 25th and 26th.
Memphis, October 28th, 29th, 30th, 31st and November 1st, and matinee on 2nd.
Louisville, November 4th to 9th; three matinees.
St. Louis; November 10th to 16th, three matinees.
Evansville, Ind. 17th.
Terre Haute, Ind. 18th.
Fort Wayne, 19th and 20th.
Kalamazoo, Mich. 21st.
Jackson, Mich. 22nd.
Elgin, Ill. 23d.
Chicago, November 24th to 30th, three matinees.
Milwaukee, December 1st.
Lima, Ohio, December 2nd.
Findlay, Ohio, 3rd.
145 Piqua, Ohio, 4th.
Sandusky, Ohio, 5th.
Youngstown, Ohio, 6th.
Beaver Falls, 7th.
Meadville, December 9th.
Franklin, Penn., 10th.

Erie, Penn., 11th.
Bradford, Penn., 12th.
Newburgh, New York; 13th.
Birmingham, Conn., 14th.
New York, December 16th to 21st; Grand opera-house; two matinees.
Harlem; December 23rd to 28th; Theatre Comique; two matinees.
Pittsburgh; December 30th to January 4th; two matinees.
New York; January 6th to 11th; People's theatre, two matinees.
New Haven, January 13th.
Bridgeport, January 14th and 15th.
Newport, R. I., 16th.
Fall River Academy of Music; January 17th and 18th & matinee.
Grand opera-house, Brooklyn, January 20th to 25th; two matinees.
Wilkesbarre, Penn., January 27th.
Trenton, New Jersey, January 28th and 29th.
Allentown, Penn.; January 30th.
Reading, Penn.; January 31st.
Easton, Penn.; February 1st.
Philadelphia, February 3rd to 8th; two matinees.
Hartford, Conn.; Feb'y 10th.
Meriden, 11th.
Holyoke, Mass., 12th.
Springfield, Mass., 13th.
Lynn, Mass., 14th and 15th; one matinee.
Boston, February 17th to 22nd; three matinees.
Providence; February 24th to 29th; three matinees.
Morristown, Penn.; March 3rd.
Wilmington, Del.; 4th and 5th.
146 Lancaster, 6th.
Pottstown, 7th.
Mauch Chunk, 8th.
Williamsburgh, or Brooklyn, E. D.; March 10th to 15th.
Jersey City; March 17th to 22nd; three matinees.
Paterson, New Jersey; 24th, 25th and 26th; one matinee.
Hoboken; 27th, 28th, 29th and 30th; two matinees.
Chicago, Haviland's theatre; April 6th to 12th; three matinees.
Minneapolis, Bijou theatre; April 13th to 19th; two matinees.
St. Paul; April 20th to 23rd; two matinees.
Duluth, Minn.; 24th to 25th, with one matinee.
Brainerd, Minn.; April 28th.
Fargo, Dakota; 29th.
Grand Forks, North Dakota; 30th.
Bismarck, Dakota; 6th.
Glendive, Montana, 7th.
Miles City, Montana, 8th.
Bozeman, Montana; 9th.
Marysville, Montana; 10th.
Helena, Montana; 11th.
Butte City, Montana; 12th, 13th and 14th.
Missoula, Montana; 15th.

Spokane, Washington; 16th and 17th.
Seattle, Washington; May 19th and 20th.
Port Townsend, Washington; May 21st.
Canada; May 22d, in Victoria, B. C. No charge for these performances.
Tacoma, Washington; 23d and 24th.
Portland, Oregon; 25th, 26th and 27th.
Astoria, Oregon; 28th and 29th.
San Francisco; June 2d to 8th; one matinee at the Alcazar theatre.
San José, Cal.; June 23d.
San José; June 24th.
Napa; 25th.
Woodland, Cal.; 26th.
Sacramento; 27th and 28th.
147 Virginia City, Nevada; 29th.
Carson City, Nevada; 30th.
Reno, Nevada; July 1st.
Park City, Utah; July 3d.
Salt Lake City, Utah; July 4th and 5th; one matinee.
Denver; July 7th to 12th.
Aspen, Col.; July 14th.
Leadville, Col.; 15th and 16th.
Salida, Col.; 17th.
Pueblo, Col.; 18th.
Colorado Springs, Col.; 19th.
Cheyenne, Wyoming, 21st.
Grand Island, Neb., 22nd.
Sioux City, Iowa, 23rd and 24th.
Omaha, 25th, 26th and 27th; one matinee.
Newburgh, August 21st.
Trenton, New Jersey, August 22nd.
Wilmington, Delaware, August 23rd and 24th.
Richmond, Va., August 25th and 26th.
Norfolk, Va., 27th.
Lynchburg, Va., 28th.
Roanoke, Virginia; 29th.
Knoxville, 30th.
Chattanooga; September 1st.
Atlanta; September 2nd and 3rd; one matinee.
Birmingham, Ala., 4th and 5th; one matinee.
Columbus, Ga., 6th.
Augusta, Ga., 8th.
Charleston, South Carolina; 9th and 10th.
Savannah, Ga., 11th.
Mobile, Alabama, 13th.
New Orleans, Grand opera-house; 14th to 20th; two matinees.
Lake Charles, La., 21st.
Galveston, Texas; 22nd and 23rd.
Houston, Texas, 24th and 25th; one matinee.
Austin, Texas, 26th.

San Antonio, Texas, August 27th.
San Antonio; August 28th, Sunday.
Taylor, Texas, 29th.
148 Waco, Texas; 30th.
Fort Worth, Texas; October 1st and 2nd.
Dallas, Texas; 3d and 4th.
Tyler, Texas; 6th.
Shreveport, La.; 7th and 8th.
Marshall, Texas; 9th.
Pine Bluff; 10th.
Hot Springs, Ark.; 11th.
Little Rock, Ark.; 12th.
Memphis, Tenn.; Memphis theatre, October 13th to 18th; one matinee.
Nashville, Tenn.; October 20th, 21st and 22nd; one matinee at the Theatre Vendome.
Bowling Green, Ken.; 23rd.
Frankfort, Ken.; 24th.
Maysville, Ken.; 25th.
Haviland's theatre, Cinn.; October 26th to November 1st.
St. Louis; November 2nd to 8th, with two matinees; People's theatre.
Chicago; November 9th to November 15th; three matinees; Windsor theatre.
Valparaiso, Ind.; 17th.
Laporte, Ind.; 18th.
Elkhart, Ind.; 19th.
Grand Rapids, Mich.; 20th.
West Saginaw, Mich.; 21st.
Bay City, Mich.; 22nd.
Whitney opera-house, Detroit; November 24th to 29th; three matinees.
Peru, Ind.; December 1st.
Wabash, Ind.; December 2nd.
Defiance, Ohio; 3rd.
North Baltimore, 4th.
Fostoria; 5th.
Sandusky, Ohio, 6th.
Toledo, Ohio, December 8th to 13th.
Columbus, Ohio, Sunday the 14th.
English opera-house; 15th, 16th and 17th.
Terre Haute, Ind., 18th.
Lafayette, Ind., 19th.
149 Anderson, Ind., 20th.
Harris' Bijou, Washington, D. C., December 22d to 27th.
Bijou theatre, Pittsburgh, December 29th to January 3d.
Altoona, Penn.; January 5th.
Lebanon, Penn.; Jan. 6th.
Reading, Penn.; January 7th.
Allentown, Penn.; January 8th.
Wilkesbarre, Penn; 9th.

Scranton, Penn.; 10th.
Harlem, January 12th to 17th; two matinees; Columbus theatre.
Jersey City; January 19th to 21st; two matinees; Academy of Music.
Brooklyn; January 26th to 31st; two matinees; Grand opera-house.
New York; February 2d to 7th; two matinees; People's theatre.
Gaiety theatre, Providence; February 9th to 14th; three matinees.
National theatre, Philadelphia; 16th to 21st; three matinees.
Miner's theatre, Newark; February 22d to 27th.
People's theatre, Philadelphia; March 2d to 7th.
Jacobs' theatre, Cleveland; 9th to 14th.
Jacobs' theatre; Toronto, Canada; 16th to 21st.
Jacobs' theatre, Montreal, Canada; 23rd to 28th.
} No charge for these performances.
14th Street theatre, New York, March 25th to April 3rd.
Lyceum theatre; Buffalo, April 5th to April 11th.
Albany theatre; Albany, N. Y. April 13, 14 and 15.
Utica, New York, 16th.
Oswego, N. Y., 18th.
Jacobs' theatre; Rochester, N. Y., 20th to 25th.
Jacobs' theatre, Paterson, N. J., 27th, 28th and 29th.
Jacobs' theatre, Hoboken, N. J.; April 30th, May 1 and May 2.
150 Bonnell's theatre; New Haven, Conn.; May 4th, 5th & 6th, with a matinee.
Meriden, Conn., 7th.
New Britain, Conn., 8th.
Bridgeport, Conn., 9th, with a matinee.

1891.

Trenton, N. J., August 13th.
Numbering in all 591 performances.
Trenton; Atlantic City; Philadelphia; Boston; Baltimore; Lynn; Lowell; Lawrence; Salem; Manchester; Nashua; Concord; Lewiston; Bangor; Portland; Biddeford; Portsmouth; Haverhill; Springfield; Worcester; Brocton; Fall River; Newport; Brooklyn and Philadelphia; Pittsburgh; Chicago; Detroit; Cincinnati; Indianapolis; Dayton; Columbus; St. Louis; Kansas City; St. Joe; Omaha; Council Bluffs; Sioux City; Mankata; St. Paul; Minneapolis; Milwaukee; Chicago, at Haviland's; Chicago at the Windsor; Joliet; Streator; Elgin; Pullman; Zanesville; Wheeling; Beaver Falls; Meadville; Bradford; Franklin; Erie; Hornellsville; Elmira; Binghamton and Port Jervis.

I find that at the above-named places the play was performed for 26 consecutive weeks; I find that an average performance of 6 performances each week would amount to 156 performances which I have added to the performances at the places hereinbefore stated,

which amount to 591 performances. These performances together make the number of 747 performances, as hereinabove stated by me.

IV. I further respectfully report that said unauthorized performances took place on sharing terms.

All of which is respectfully submitted.

January 10th, 1893.

JOHN E. WARD, *Master.*

(Endorsed:) Pl'ff's Ex. 2 B, May 29, '95. United States circuit court, southern district of New York. Augustin Daly, com-
151 plainant, against George P. Webster and William A. Brady, impleaded, etc., defendants. Master's report. U. S. circuit court. Filed Jan. 17, 1893. John A. Shields, clerk.

In accordance with said decree, proceedings were had before the master named in the said decree, John E. Ward, Esq., who made the foregoing report, Plaintiff's Exhibit 2 B, which was confirmed, and thereupon a final decree was entered on the 1st day of April, 1893, as follows:

PLAINTIFF'S EXHIBIT 2 D.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the court-house, in the city of New York, on the 1st day of April, 1893.

Present: E. Henry Lacombe, circuit judge.

AUGUSTIN DALY, Complainant,
against
WILLIAM A. BRADY and GEORGE P. WEBSTER, Impleaded, &c., Defendants.

This cause having come on to be heard upon the report of John E. Ward, Esq., one of the masters of this court, to whom it was referred to ascertain, take, state and report to the court an account of the number of times the railway scene mentioned and de-
152 scribed in the interlocutory decree entered herein on the 5th day of November, 1891, was used and produced by said defendants without the sanction and authority of said complainant, in said dramatic composition entitled "After Dark," and where each and every of such unauthorized performance and production took place, and the terms and agreements under which said unauthorized performance took place, which report bears date the 10th day of January, 1893, and upon reading said report filed the 17th day of January, 1893, and the defendants' objections thereto filed the 26th day of January, 1893, and the said cause having been argued by counsel and due deliberation had thereon,

It is ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge and decree that the exceptions to the said master's report be and the same are hereby overruled, and the said report is hereby confirmed

in all particulars; that the findings of the said master in said report are hereby made the findings in this court; that the number of times the said railway scene was used and produced by the said defendants without the sanction and authority of the said complainant in said dramatic composition, entitled "After Dark," is and was seven hundred and forty-seven (747) times, and that said unauthorized performances took place at the times and in the places specified in said master's report.

And it is further ordered, adjudged and decreed, that the said defendants pay to the said complainant his cost in this suit, as taxed at $328.65, and that the complainant have execution for such costs.

E. H. LACOMBE.

The plaintiff then offered testimony to show the plaintiff's actual damages from the alleged infringement.

(Plaintiff rested.)

153 Defendant moved to dismiss the complaint on the same grounds which are hereinafter set forth in his motion at the close of the defendant's case.

Motion denied and defendant then and there duly excepted.

The case was then opened for the defendants.

The defendants offered testimony tending to show that another play produced by the plaintiff which contained the same railroad scene was not a commercial success.

Cross-examination waived.

J. CHARLES DAVIS, after having been sworn as a witness for defendant, testified as follows:

That he was a theatrical manager for fifteen years, and associated in the management of the Fifth Avenue theatre, People's theatre and Broadway theatre, and was connected with the People's theatre in May, 1889, when "After Dark" was performed.

Q. Will you state the difference in business between the railroad scene as performed when one character was rescued by another and as performed when the character rescued himself by staggering off the track?

Objected to upon the ground that it is conclusively established by the findings of the court in the equity suit, that there were 747 infringing performances, and it is immaterial to show whether there were other performances which drew a greater or less audience.

Mr. DITTENHOEFER: We offer to prove by the plaintiffs that the play "After Dark" drew as much money and was as valuable in a pecuniary sense or in a commercial sense with the railroad scene performed in the manner not violative of plaintiff's rights, as held by the circuit court of appeals.

Plaintiff's counsel objected to the evidence. Objection sustained, and defendant then and there duly excepted.

154 Defendant's counsel offered in evidence publications which were read in evidence in the equity suit for the purpose of

showing the state of the art at the time that plaintiff claims to have obtained his copyright.

Mr. OLIN: I object that this is wholly irrelevant here.

Mr. DITTENHOEFER: We propose to show that the plaintiff's copyright is good for nothing by offering the same evidence that was before Judge Coxe.

The COURT: It does not follow that you can introduce any testimony to show the invalidity of the copyright, because the theory of the other side is that the validity of the copyright is *res adjudicata*, so far as you and Mr. Daly are concerned.

Mr. DITTENHOEFER: We offer in evidence a publication, entitled "Captain Tom's Fright," from the *Galaxy*, published in 1867.

Objected to on the ground that the question of copyright is *res adjudicata*. Objection sustained and evidence excluded. Defendant's counsel then and there duly excepted.

The publication so offered in evidence is as follows: "A magazine or publication entitled the *Galaxy*, vol. III, 1867," the title page of which is as follows:

"The *Galaxy*, an illustrated magazine of entertaining reading, vol. III, 1867, January 1, 1867, to April 15, 1867, New York. W. C. & F. P. Church, 39 Park row, 1867."

"Captain Tom's Fright."

"Captain Tom's Fright."

"I tell you I never was so frightened in my life," said Captain Tom Kestle, filling his brierwood and running home the tobacco with a bit of stick, "excepting once," he added, reflectively.

"How was that, Captain," said I, detecting indications of a yarn; "let's have it if it's worth telling."

155 The captain lit a cedar splint at the fire and proceeded to ignite his pipe, the flame of the dry stick bringing out his strong, quiet features and grayish hair and beard in relief against the black woods behind him.

Cannot some modern Rembrandt take for his subject the head of a fine-looking soldier as he lights his pipe at night? Hundreds of times has the picturesque effect caught my eye and made me wish that it could be fixed on canvas.

Our fire had been suffered to die out at sunset, save some smouldering embers as would attract no hostile eye, and only threw a dim red glow over the half dozen officers crouched around. We were just behind the crest of one of those passes in the Virginia mountains, which were taken and lost so many times during the war for the Union. We had a section of light artillery, five or six companies of infantry, and a mounted orderly or so, and were instructed to hold the position for twenty-four hours at all hazards. Looking up the stony road from where we sat under the cedars, one could just see the outline of our two field-pieces where they stood pointing over the crest of the hastily constructed parapet, and about them the dim forms of the gun squads waiting for the expecting firing of the pickets some two hundred yards down the slope beyond.

The cold mountain wind swept over the ridge and down through the rustling cedars to the now empty and blackened redoubt which we had carried the day before. Captain Tom had led the assault, and it was the story of his experience therein that he had just finished, with a remark as to his comparative fright on that and a former occasion. The captain had the coolest way of talking about his personal frights, a way which we understood perfectly, for most of us had too often seen him in action to believe his astounding accounts of his own cowardice. I actually believe that to this day many a casual hearer of his yarns thinks
156 that Captain Tom was the coward he painted himself, for often would a stranger ask, after hearing him relate some of his exploits how such a shameless sneak could remain in the service with honor. This time, for instance, I had seen the captain with my own eyes lead his men through the bed of a stream under a galling spatter of canister and musketry, form them under a bank—he standing the while on a rock exposed to the fire of a hundred rebel riflemen—then, with a magnificent rush and scramble take them over the parapet and into the redoubt, he being the first man over by at least six or eight paces, and hauling down their bunting with his own hands.

In his account the captain figured somewhat as follows: "I formed the men well back in the woods, behind some big trees, feeling all the while as a man does when he is swimming in deep water and sharks are 'round. I gave the word 'forward,' and marched at their head like a hero until the rebs began to pepper us as we came out of cover. Then away went the men with a cheer into the water. I got behind two of the biggest men in the company and made out to cross the water without much exposure except from wet feet. The men formed somehow or another under the bank and I stood behind a big rock." I suppose this to be the rock I saw him standing on. "Then presently they gave another cheer and up they went. My first sergeant prodded me on with his bayonet—the fellow seems to like me and to be jealous of my fair fame—and somehow I got over the parapet, and seeing that there was no more fighting I marched up to the flagstaff and hauled down their colors with all the dignity of a sergeant major. I tell you I never was so frightened in my life—except once." This "excepting once" was an addition to the captain's usual formula for closing his yarns and checked by its seriousness the laughter which commonly followed. "Well," said he, in answer to my question and request, "We're all pretty good friends here, and I don't mind telling you now,
157 although the yarn involves the reason why my hair is gray, as you see it. But I haven't visited those confounded outposts for the last two hours or so. I say, Charlie, would you mind going with me? If there is one thing I am more afraid of than another it is visiting the outposts at night, and I'll swear I have had more of it to do than any other man in the corps." I, of course, gladly accompanied him. I was an aide on the division staff, and had been sent up with this detachment to bring instant news of disasters, should any occur, as well as to report all events of im-

portance from a headquarters' point of view. I was always willing to be on hand if anything was going on, for I well knew that, disaster or not, I should be cross-examined by the general the moment I reported at headquarters.

This night of which I am writing, with perhaps half a dozen others, is marked in my memory, and stands distinct from all the nights of long and weary campaigns, not so much from imminent peril as for the wild picturesqueness of its accessories. We turned our backs on the fire, and stumbled from among the dimly illumined cedar trunks into the dark road, walked up past the picket rope, where the artillery horses stood, ready harnessed, champing their bits, past the black caissons, up to the parapet where the gun squads crouched behind the slight shelter, and the two cannon looked over into the darkness beyond, ready to shatter the mountain stillness with their roar. Behind us a dim glow on the air showed where our little force lay under the woods and beyond was the black, empty darkness of the wide Shenandoah valley, unillumined by a single light save the fires of one or two detachments of the Federal Army, while away to the southward a red glow lit up the horizon where the two great tidal waves of Union and secession were chafing as they met, and where, very likely, shots were ringing and flames roaring in the night. Near us, however, all was stillness as we crossed the embankment and walked silently down the steeply
158 sloping road. We advanced some two hundred yards, and then paused as we heard an ominous double click. The captain whistled softly and was answered from the direction of the click. We advanced, and a whispered consultation with the vedettes assured us that all was right, although one of them had heard voices, apparently a long way off down the mountain. We passed on to the other posts, and in the course of half an hour were once more seated at our fire and the captain was charging his inevitable pipe preparatory to the promised yarn.

"Well, fellows," began he, "I feel sort of confidential tonight—a strange feeling for me, by the way—and I think some great piece of luck must be awaiting me as a consequence. However, I think I will tell you the story, although I never told it to a living soul before, and the very thought of telling it now sends a chill up the small of my back, so you mustn't be astonished if I turn childish before I get through. You must know that in the summer and fall of 1850 I was, in my profession of engineer, rebuilding a long bridge on the Sunset and Great Western railroad. A pretty lonely life I led, for there was hardly any one with whom it was a pleasure to associate for any length of time, though perhaps that was, to some extent, my fault, for I was always rather distant or reserved with the men, more from a fear of seeming to intrude, or from the opposite horror of seeming to court popularity, than from any other reason. My station was at the end of a long and perfectly straight stretch of road. I suppose there must have been fifteen miles of track without a curve of any sort, save that which belongs to the surface of the earth. As the line neared the river an easy grade raised it a few feet so as to carry the roadway of the bridge clear of

the floods. Rather more than half way up this bridge was a cut-off or side track, crossing the river on a temporary trestle-work and intended to remain only while the main bridge was under-
159 going its repair. This cut-off was set at a very acute angle so that the speed of passing trains was scarcely checked while crossing the river. One could stand on this little grade and see the approaching trains at least a dozen miles off, when the air was clear, as they came tearing across the prairie and up the grade and over the bridge, whirling past as a momentary glimpse of the world and its life. Perhaps the conductor, if he was a clever fellow, would throw us off a package of papers. That was all we knew of outside life, for none but 'gravel' trains condescend- to stop at our little station. Our quarters consisted of a cluster of board shanties, with one of more luxurious build for me, all located for convenience of getting water a quarter of a mile above the bridge, where the banks of the river were accessible.

"Those of you who have Irishmen in your companies well know that whiskey naturally gravitates to their vicinity, and almost always of a Saturday night a supply was on hand in our little community, on which the week's wages were pretty certainly expended. Saturday night was always distinguished by a tearing spree, which invariably terminated in a free fight; but as the combatants were usually too drunk to do much harm to one another when the fighting time came around, no material damage was ever done. There was one among these fellows with whom, from the first, I had foreseen trouble. A thick-set surly dog he was; Pete McGee by name, and a 'Fardowner' by birth. He had always some fault to find about his pay, was always grumbling, was continually shirking his work, and was withal a mighty drinker, and when drunk a mighty man to lead the crowd. Our antipathy to one another seemed to be led to a climax by fortune, and I had good reason to believe that twice already had Pete instigated an attack on me in my house, said attacks having been easily repelled by sundry discharges of my revolver at a high elevation.

160 "One day I was watching the labors of a gang who were shoveling dirt out of a drain which had been filled by a recent storm. I noticed that Pete was shirking frightfully by taking a mighty small quantity of earth on his spade and throwing it as short a distance as possible. He saw that I noticed him, and by a muttered remark to his companions, he let them know that he did. In a few minutes I saw that the whole gang had word of the shirking of Pete and my observance thereof. I made up my mind to have it out with him for the sake of discipline. I had with me a three-foot stick which I always carried for measuring purposes, a good, stout, hard cane of hickory, of which, thanks to a long residence with an old English backwoodsman, I knew also the use in self-defense. 'Pete,' said I, 'if you don't do your full share of work from this time on, your name goes off the pay-roll tomorrow night, and you leave by the next train.' Pete stopped work and looked at me a moment from under his shaggy brow, then leaned his spade against the ditch side, hitched up his trousers, removed his dudheen

from his mouth and stuck it in his hat, and then climbed slowly out of the ditch. Pete's shillalah and brown jug were never far from him, and he walked coolly towards them, remarking, 'Ye dirty spalpeen, I'll break the head of ye shure as my name's Pete McGee, an' ye may tak' me name off the roll and be damned to ye.' In an instant he had his bit of blackthorn in his hand, and knocking off his hat, pipe and all, he tightened his belt and came towards me, as ugly-looking a specimen as you would wish to meet. I had heard a man remark, 'Boys, here's a discussion wid sticks, shure enough,' and saw the hands stop work and watch the progress of events with the enthusiastic interest of Irishmen when they become aware that a fight was approaching. My authority was at an end if I backed out, whereas, if I made a good fight I might retain my authority, even if whipped. So I glanced around to see that
161 there were no rolling stones or the like to step on, and made up my mind to fight it out. 'Pete McGee,' said I, as he drew near, 'you'd better think twice before you do it.' 'Hould yer tongue, will ye? I've stood your tyranny long enough,' was the only reply I received, and in a moment Pete had struck, I had parried, and we were at it. If any of you have happened to see quarter-staff play on board a man-of-war, you will appreciate the game. Some hundred men take the stick at a time and pair off in two long lines on the main deck. Very often any two men who happen to have a quarrel, settle it by getting opposite to one another and pitching in. I have seen some pretty sharp fights at such times. Pete was evidently an old hand at the sticks, and had doubtless figured in former days at many a county fair in the old country So I stood on the defensive, catching blows like flail strokes aimed at head, leg and side with astonishing rapidity. Pete was evidently surprised at finding me *au fait* with the sticks; and, in truth, I had all I could do to keep him from breaking my head. As it was, he gave me an ugly crack on the left shoulder, and hit me slightly elsewhere once or twice before I let him know that I could strike. At length, emboldened by my continued attitude of defense, he attempted to break my guard and head at the same time by a downward blow, nearly corresponding to the seventh cut of the broadsword exercise. It is no joke to parry a blow of that kind, struck by such a wrist as Pete had, for a slight deflection of the blow will disable your knuckles, and if you are not up to the dodge, your own stick will be driven down onto your head, which will probably end the fight. That blow, however, sealed Pete's fate. I received it on my stick held over my head and sloping sharply just clear of my left shoulder, in fact slightly touching it. He tried to check his blow, but had put his heart too much in it; his shillalah glanced harmlessly past my shoulder, *which* with a quick turn of the wrist and
162 forearm, I laid the whole weight of my blow fairly on the crown of his head, and Pete McGee measured his length on the ground, while an involuntary hurrah rose from the balance of the workmen, who forgot, in their enthusiasm for the science, that their own champion was defeated.

"Pete worked like a Trojan after that, and I even grew more

popular with the hands, except when they were in liquor. It is a great thing among such fellows to know that in muscle and pluck the 'boss' is not inferior to the best of them. Two weeks passed after my battle royal with Pete, and Saturday night came. The men were paid off, and the usual consumption of the 'crature' began. I examined my revolver; all six barrels were properly capped and the points of the six bullets showed as I revolved the cylinder, standing where I could catch the last light from the west. A squad of the hands strolled by as I stood at the window. I returned their 'good evening' and heard the word revolver passed among them as they went on, showing that they noted my employment. I laid my pistol on the centre table and leaned on the window sill, watching the light fading in the west, smoking my pipe, and scarcely noticing the entrance of a woman who did my housekeeping for me. She went in and out as usual, 'redding up' the room for the night, and finally bade me good night and took her departure. I presently made all fast and seated myself for a quiet evening with my pipe and books. By and by I began to hear the mirth at Pete's shanty, away at the other end of the street, waxing fast and furious. I heard the noise until nearly ten o'clock, when I turned in and was soon asleep. The next sound I heard was a stunning blow on my door and a confused murmur of voices outside. To seize my revolver and jump into my trousers was the work of an instant, and, on the repetition of the blow, I called out, 'Stand clear outside; I am going to fire through the door.' The second blow had
163 nearly dashed in the frail pine boards, and as I spoke the third shattered the door, and I could see by the dim starlight a dozen heads and sticks pressing through the doorway. Aiming at the leader, I pulled the trigger, and heard the click of the hammer on the capless cone. Quick as thought I tried two more barrels, hurled the useless revolver at the nearest head, and, seizing a chair, smashed it to pieces on the next. Then came a sharp crack or two over my own head, and the stars faded away and the dim room vanished in greater darkness and I was senseless. How long I remained unconscious I cannot tell, but it could not have been long, for when I first felt the damp, cool air blowing over my face, I could hear the retreating steps and drunken laughter of a party of men who, I concluded, were my late assailants. Gradually my senses grew clearer. Presently I opened my eyes. I lay on my right side, my head resting on a cold, hard substance. Then I distinguished the rush of water afar off—against the piers of the bridge. As my eyes became steadier I saw that the cold substance on which my cheek rested was a railroad track. I could see a few yards of it, with its companion rail, on which my feet rested. Beyond and around was the dark prairie, and a quarter of a mile away twinkled a solitary light in one of the cabins. All this I stupidly realized as my stunned faculties returned, when suddenly the frightful question flashed upon my mind, 'has the night express passed?' In an instant every sense was actually awake. I was lying bound to a cross-tie, my head slightly raised rested on a rail. I was not very near the head of a bridge, but far enough up the grade to look out

over the prairie. Evidently, Pete had planned a vengeance terrible indeed. Yet, how did I know but the train had passed. I twisted my neck till the cords cracked, and made out to see the "all-right" signal twinkling at the bridge. I shouted and yelled for help, but the more earnest I became the more every one within would think my shouts only the maudlin cries of some drunken Irishman.
164 The signalman at the bridge could not leave his station for any ordinary cause, and certainly the cries of a drunken man on a Saturday night were not extraordinary. All this passed through my mind as I shouted, until my strength was gone. Then I lay and silently thought. My servant must have removed the caps from my pistol. Why should she? What cause for such treason had I ever given her? Why had I located the cabin so far from the track? Think as I would, the stern fact of my situation remained, and I could only hope that one o'clock, and the train, too, had passed. But now low down on the very edge of the black horizon my eye caught a faint red gleam. Too often had I watched the trains to doubt for a moment. I knew the very spot at which that dreaded red light would appear. So, then, twenty minutes at the very longest, provided no accident happened, was the lifetime remaining for me. I strained every fibre to break my bonds or twist my neck clear of the track, but the rope was too strong, and a couple of stakes driven one on each side of my neck, forbade any motion except a slight lateral one. In the intensity of my muscular strain I had shut my eyes. As I opened them I saw before me, nearer, brighter, steadier, the shining reflection of the advancing train. Again I shouted, again I strained, but to no purpose. Then I lay and watched the light as I had often done in happier times, until it seemed to me that my brain must give way. I closed my eyes and tried to pray, but that fearful light shone through my eyelids and banished every other thought. And now a faint yet terrible distant rumble began to fill the air; it seemed as though my inmost soul felt that sound. Yet I remember noticing the most trivial things—a cricket that sang near by, a toad that climbed on the rail, a prowling cat that came suddenly upon me and ran frightened away—for even in that fearful moment a sense of the ludicrous was alive, and I was conscious of a feeling of amusement as the creatures scurried off. But, meanwhile, the faint rum-
165 ble had grown louder, and I even fancied that I could perceive a slight vibration of the rail on which my head rested, and of the ground on which I lay. I think that about this time I must have become insane, for I only remember hearing my voice in impotent shrieks, and feeling my limbs, as it were, those of another man, straining themselves to be free. All the dreadful particulars of my approaching death whirled through my brain during these few moments. Once I fancied I could hear footsteps coming towards me from the bridge, and hoped wildly that they would reach me in time. But now I could see the red reflection of the lamp on the long, straight track, and the thunder of the train was drowning all other sounds. Once more I strained every muscle till the very flesh seemed to tear; one final cry I gave for help from

God or man. Then I opened my eyes—closed in my agony—and looked silently at my destruction. For one dreadful instant I saw the silver mirror of the reflector and felt the earth tremble under the roaring train, and then as the mighty engine rushed upon me nature gave out, and amid a crash of sound and a red glare of lamp and fire I swooned. The wheels of the night express had passed within a foot of my head. I had been bound on the straight track over the bridge, and the train passed me on the cut-off").

Captain Tom ceased. Hardly any comments on the story were made by the group of officers, for, after a moment of breathless stillness, the sharp crack of two or three rifles, which seemed to have been waiting for the end of the story, rang out over the bridge. In a moment the officers were running toward their respective commands. With a quiet, rough, eager haste the infantry were manning the rifle pits, and the gunners stood with lanyards pulled taut, ready to fire at the word.

Fifteen minutes later I was tearing down the stony road, my horse's hoofs striking fire to the accompaniment of a rattling of rifles from the mountain side behind me. Before I left I had
166 looked an instant on the dead face of Captain Tom, who fell at his post like a hero that he was.

I had barely time to mount and run for it as the gray-clad Johnnies swarmed over the parapet and captured our little band. We had been overpowered by the advance of a division of Stonewall's army, and I thought myself lucky to be able, by dint of hard riding, to reach the grand guard of our division half an hour before Stonewall's cavalry drove in our pickets on the Shenandoah.

C. L. N.

Defendants also offered in evidence a printed book of a play called "London by Night," which publication contained the following statement: "London by Night," a drama in two acts by Charles Selby, first produced at the Strand theatre, January 11th, 1844."

Objected to on the ground that the question of copyright is *res adjudicata*. Objection sustained. Defendant then and there duly excepted.

"LONDON BY NIGHT." Scene III, act II, is as follows:

London by Night.

A drama in two acts.

By Charles Selby.

First Produced at the Strand Theatre, January 11th, 1844.

(Vignette.)

DRAMATIS PERSONÆ.

FAIRLEIGH (a Kentish Banker and Merchant).. Mr. Broadfoot.
HENRY MARCHMONT (a Naval Officer).....Mr. John Webster.
FRANK MARCHMONT (his Profligate Brother) Mr. Roberts.
167 HAWKHURST (a Character not unknown to the Police).....Mr. Searle.
SHADRACK SHABNER (a Bill Discounter of the Hebrew Persuasion).....Mr. H. Lee.
ANKLE JACK (a Shoeblack).....Mr. Cockerill.
NED DAWKINS (a Member of the Cadging Fraternity)..... ... .Mr. Saunders.
—— OR DOGNOSE (the Dram-drinker).....Mr. H. Hall.
LOUISA GRAY (an Orphan, deserted and betrayed)..... .....Miss Walcott.
Police, Cadgers, Wedding Guests, Railway Servants, Guards, &c.

TIME OF REPRESENTATION.—One Hour and Forty Minutes.

SCENE III.—*The Brick Fields at Battersea. Lone House,* L. *The River in the distance. Night, and Moonlight. A railroad track runs at back from* L. *to* R.

Enter DOGNOSE.

Dog. 'Tis near the hour—she will soon be here. I must not contemplate the scene; it is one of horror and darkness, such as to freeze the current of my blood. For myself, I might spare her; but Amy's soul denies pity. Hark! footsteps in the distance! They are those of a woman. Let me retire. My limbs, as if palsied, seem to refuse performance of their functions.

Enter LOUISA.

Lou. What could induce Frank to choose so lonely a place as this for the *rendezvous.* Doubtless he is compelled to do so to evade the snares and treachery that surround him. Oh, why did he
168 not confide in me? Had he have acted honorably in the first instance, what misery might have been spared him. Ah! a stranger!

Dog. Start not, but answer. Are you the woman I am here to kill?

Lou. Kill? Mercy! why do you utter such a terrible word?

Dog. What do you want in this deserted spot?

Lou. I am seeking some one, but it cannot be you. He desired me to be near the lone house, and this should be——

Dog. I ask again what you want, and why you approach yonder crazy tenement?

Lou. I expected to meet a person here.

Dog. Your token?

Lou. I was bid to pronounce a sentence.

Dog. Then speak the words.

Lou. "I saw Amy Willis die!" (*Dognose raises his knife.*) Ah, wretched man! What would you do? You surely would not take the life of one who never injured you?

Dog. Never injured! Ha, ha, ha! But I came not to bandy words. My object is revenge—dire and fearful! You think I am acting under the impulses of insanity, but my reason is as lucid as your own.

Lou. Stay, miserable man! your murd'rous hand a while! There is some terrible mistake—you cannot believe that a poor lone girl can possibly be your enemy?

Dog. (*Regards her.*) Had it been any other than yourself, you would have been a dead woman ere this! But there is mildness in your eyes—innocence in your speech. I hesitate—I tremble—I freeze beneath your glance. Repeat your words.

Lou. "I saw Amy Willis die!"

Dog. It is, then, true?

Lou. Yes; for Amy Willis died in these arms—she was
169 my mother. (*Dognose lets the knife fall, and stands transfixed.*) Oh, why do you gaze on me thus wildly? A shadow is thrown over my heart, and a blight over my young and ardent spirit! (*Dognose caresses her.*) Oh, why do you press me to your bosom, and grasp my hand so earnestly—you, who would but in the past moment have been my murderer?

Dog. My tongue cleaves to my mouth—I can hardly speak! Emotion—happiness—joy stifle me! Learn, girl, that your mother was my wife!

Lou. Great God! then you are——

Dog. Thy father. (*Louisa rushes into his arms.*)

Lou. My father—my father!

Dog. 'Tis the first time that thou hast ever addressed me by that endearing word, for thy infant's lips had not learnt to lisp it when I was cruelly torn from my home. (*Embraces her.*) This happy hour repays the years of misery and suffering I have endured!

Lou. From this time, dear father, we will never part.

Dog. Never—never! I cannot afford to give up my newly found treasure! (*Embraces her again.*) We will often speak of thy mother, who rests in heaven!

Lou. Yes; for she was kind and good. She often bade me cherish my father, and with her dying breath blessed him.

Dog. Poor Amy! she knew that I was innocent.

Lou. Yes; and for that reason a monster sought her life. He murdered her because she held proofs of his own guilt.

Dog. Proofs say you——

Lou. Yes, she by a fortuitous circumstance discovered the culprit and his real name.

Dog. What was it?

Lou. Bernard Jackson. After poor mother's death he made away with the evidence against him, and the stigma of the robbery of which you were unjustly accused, still attaches itself to your name.

Dog. The villian!—but the day of retribution is at hand. I have now the means of vengeance, and will use them. Come, girl, you've seen a father's downfall, be now the witness of his exaltation. Conceal yourself in yonder habitation while I circumvent our deadly enemy.

(*Music.—Louisa enters the Lone House,* L., *the interior of which is visible to the audience. Dognose locks the door—holds up the key, and then places it in his pocket.*)

Enter HAWKHURST *and* SHABNER.

Hawk. Well, Dognose, have you been successful?

Dog. (*Abstractedly.*) I will do it—so good an opportunity may never occur again.

Hawk. You do not answer me.

Shad. He seems in one of his moody fits—he has been drinking, no doubt—let me question him. Mr. Hawkhurst wishes to know whether you have been as good as your word with respect to the girl Louisa.

Hawk. Is your work complete?

Dog. No—for you yet live, villain.

(*Rushes upon Hawkhurst. Hawkhurst with the assistance of Shabner is enabled to wound Dognose—he falls senseless, and is left on the iron track of the railway by the assassins.*)

Hawk. I think I've settled him—if not the coming engine will complete the work. Now then, to secure the girl—she can't be far off.

[*Exit, followed by Shabner.*

Lou. (*In the house.*) All seems quiet, and yet just now fancy pictured to my mind a struggle of contending men. I hope my father will soon return—I was very wrong to suffer him to depart alone. (*Goes to iron grating which forms the door.*) From this spot I can witness his approach. Ah, what is that? My eyes surely cannot deceive—there is some object lying across the iron road before me—it can never be a human being in such a dangerous position. I must warn them. Ah, the gate is locked—how unfortunate. The train will be down in ten minutes—if the poor creature is not sleeping, my voice may be heard.

Dog. (*Feebly.*) Who's that?

Lou. Heavens! 'tis my father.

Dog. Listen to me, and restrain your grief, for I have only five minutes to live.

Lou. (*Shaking gate.*) Oh, and I cannot aid him!

Dog. Never mind, you can avenge me Hawkhurst is a——

Lou. (*In agony.*) Oh, I must get out.

(*Shakes gate again.*)

Dog. Can't you force out a bar—I am too weak to move.

Lou. Lock and bars alike defy me.

Dog. Is there nothing in there—no hammer, no crowbar?

Lou. Nothing. (*She searches the apartment; faint steam whistle in the distance.*) Great God—the train! (*Paralyzed a moment—resumes her search—shrieks as she discovers an axe.*) Heaven has not deserted me—courage—(*strikes gate*)—courage! (*The steam whistle is heard again nearer, and rumble of train on the track.*) It must give.

(*Noise of train increases. A last blow—gate flies open and Louisa rushes to Dognose. Just as his head is removed from the track, the train passes with a roar and a whistle.*)

172 (*Enter* HENRY *and the whole of the characters except Hawkhurst.*)

Hen. Providence be praised, you are saved, and restored to happiness, Frank. Accept from my hand your wife—Louisa!

Dog. The villain, Hawkhurst—where is he?

Hen. He is now a prisoner of the law. As Bernard Jackson, your old enemy, let the law punish him. Your existence hitherto has been a long night—but there is a morning—let us hope that it will bring sunlight, genial gales, and comfort to your future days, while it banishes the remembrance of those scenes which have been enacted in London at night.

CURTAIN.

Defendants also offered in evidence a printed book of a play called "Railroad Station," first produced at the Royal Olympic theatre October 3, 1840.

Objected to on the ground that the question of copyright is *res adjudicata*. Objection sustained. Defendant then and there duly excepted.

"Railroad Station."

Part of the scene 1 is as follows:

The Railroad Station.

SCENE.—*The waiting-room at the —— station. Chairs, tables, pens, ink, papers, wine glasses, &c.—window,* C.—*doors,* R. *and* L.

Sleeper. (*At window.*) Stand out of the way, there! the train will be here directly.

173 *Shutup.* (*Without,* R.) This way, sir, this way!

SHUTUP *passes window and enters at* R. D.

This is the waiting-room—the train will be here directly.

[*Exit at* R. D. *after having shown in* Mr. SAMPSON JONES, *who enters slowly, staring round.*

Jones. Bless my soul alive! what a wonderful place! What a deal of money it must have taken to build it—so extensive, so grand!

What a nice room this is—the nicest room I ever saw! I'll be bound there isn't such a room in all the village of Tinkerton, where my establishment is. What would Mrs. Jones say if she could see it?

Sleeper. (*At door.*) Do you expect anybody by the next train?

Jones. Yes, I expect my father.

Sleeper. Then you had better look out, for the train is coming.

(*Bell rings.*)

Jones. Ah, the train coming? Now I wonder whether my father is in it! Haven't seen the old gentleman for many a long year—and now he's coming all the way from London on purpose to visit me, and writes to tell me to be sure to meet him at the railroad station, lest he shouldn't find his way, so here I am. Oh, la! there's the train.

(*Whistle of engine is heard—the noise of the carriages, and the train is seen to pass swiftly by the window.*)

Well, I declare, it almost takes away one's breath to look at it! What would Mrs. Jones say to that?

Voices. (*Without.*) The Royal hotel! Dee's hotel! Saracen's Head! The Union! The Nelson! St. George's travern!

(*Noise.*)

174 *Jones.* There's a row! (*Passengers pass the window.*) What a crowd of people! It's positively astonishing! I wonder whether my old father is amongst them or not? Crikey, what a lot of folks! Formerly, the coach used to be very well loaded with fourteen passengers, but now they come four hundred at a time, and room to spare. What would Mrs. Jones say to that? (*Goes to window*).

Enter MRS CHARLES SMITH, R. *door.*

Mrs. C. At last we have arrived! I hope Charles is waiting for me, and then this plague will cease. I don't know anything more provoking to a pretty young woman—and that everybody allows I am—than when she is travelling without a male friend, to be subjected to the attentions of some stranger. All the way from London have I been suffering such an infliction from the disagreeable young man who sat opposite to me. I am sure, if impudence will gain a point, he must win everything he tries for—I never saw the like of it. However, it's over now, thank goodness, and I must look out for Charles.

Enter JACK ROBINS, *hastily, at* R. *door.*

Robins. Which way did my goddess go? Surely I have not lost her!

Mrs. C. Oh, gracious me! if he isn't following me here.

Robins. Ah, there she is! Sweet lady, I feared I had missed you. Pray take my arm—nay, I beg!

Mrs. C. Sir, I beg I may not be teased any longer with your troublesome attentions.

Jones. (*At window.*) I don't see anything of the old buffer!

Robins. My dear madam, pray don't name it. Consider we are

fellow-travellers; only call to mind the many miles we have
175 come together—the many risks we have run in each other's company—of the engine bursting—the carriages getting off the rail—the——

(*Suddenly kisses her hand—she snatches it away angrily.*)

Jones. (*Turns at the same moment.*) Oh, dear! they're making love at a railroad pace. What would Mrs. Jones say to that?

Mrs. C. Once for all, sir, I tell you I am a married woman.

Robins. Never mind that, I am not particular.

Mrs. C. And I every moment expect the arrival of my husband.

Robins. That's another matter. If your husband comes, I give you up, but under no other circumstances whatsoever will I do anything of the kind. No, dear madam, love at first sight, that soul-conquering passion, has taken entire possession of me, from the *os frontis* to the *tendon Achilles.* (*Aside.*) Now for a figure of speech. Yes, madam, the native of the "sweet south," or he who drinks train oil at the northern pole are all—Hollo, there's somebody taking away my trunks. Stop, stop! that's my box.

[*Exit hastily,* R *door and passes window, to* L.

Mrs. C. What shall I do. The addresses of this young man are quite intolerable! and besides Charles is so very jealous—if he sees anything of this, there will be such a disturbance, and, perhaps, a fight. What — I do? Ah, he's coming back, — declare! That's a very respectable middle-aged gentleman at the window, I've a great mind to ask him to interfere! I will.

Jones. I'm almost certain the old boy isn't in this train.

176 *Mrs. C.* It's very awkward, but I must do it. Sir, sir!

Jones. (*Advancing* L.) Ma'am, your servant!

Mrs. C. (C.) I shall feel particularly obliged, sir, if you—if you——

Jones. If I—I——

Mrs. C. The fact is, sir, that—that—to come to the point, did you observe a young man who was here just now!

Jones. A young man? I did. (*Winks.*) I know, but what I know, I never say. You may confide in me—although I cannot pretend to say what Mrs. Jones would say to it.

Mrs. C. You mistake, sir.

Jones. Well, really, I don't think that's very easy after what I saw.

Mrs. C. That young man is a perfect stranger to me, and intrudes himself very much upon me. Now I am without a male friend here, and, therefore take the liberty of requesting your protection from his insults.

Jones. Madam, consider it done—I'll put a stop to all this very quickly. The moment he makes his appearance I'll silence him. (*Aside.*) I've taken a very pretty young woman under my protection. What would Mrs. Jones say to that?

(*Robins passes the window,* L. *to* R.)

Mrs. C. Then here he is, sir. Sir, I rely upon you!

Jones. Madam, you shall find that I never forget my word. (*Passes her to* L. D.) The Joneses always keep their promises.

[*Exit Mrs. C. Smith,* L. *door as*

Defendants also offered in evidence a printed book of a play called "SCAMPS OF LONDON." The publication of "Scamps of
177–181 London" is a play purporting to have been produced at the Theatre Royal, Sadler's Wells, on November 13, 1843.

Objected to on the ground that the question of copyright is *res adjudicata*. Objection sustained. Defendant then and there duly excepted.

"SCAMPS OF LONDON." Scene III of Act III is as follows:

The

Scamps of London;

or, the

Cross Roads of Life!

A Drama of the Day,

In Three Acts.

182 (Defendant rested.)

Defendant's counsel moved for a judgment in favor of the defendant dismissing the complaint on the grounds previously stated and set forth at length at the closing of the plaintiff's case, and when the plaintiff rested, said grounds restated, being as follows:

I. That the plaintiff failed to show a valid copyright.

II. That plaintiff failed to show compliance with the statute relating to copyrights.

III. That the title as filed by the plaintiff is different from the title used upon the printed book.

IV. That a different title was filed than the one used and adopted in the books printed.

V. That there is no proof that notice of the copyright was given as required by law on each copy of every edition.

VI. That there is no evidence that defendant knowingly infringed plaintiff's rights.

VII. That what is claimed to have been infringed by defendant is not a dramatic composition, or in itself subject to protection under the copyright laws.

VIII. That the mere incident of the rescue of one character by another is not in itself a subject of protection under the copyright statute.

IX. That the mere rescue of one character by another is not a dramatic composition, nor is that rescue in itself a material part of plaintiff's play.

183 X. That there is no proof of the number of performances claimed to have been given by defendant.

XI. That the record of the action in equity in which the defendant was compelled to be a witness against himself, is no competent evidence of the number of performances given to lay the foundation of recovery in an action at law for a penalty.

XII. That there is no proof that the defendant played or performed at any time the play or dramatic composition claimed to be copyrighted by the plaintiff.

XIII. That the mere incident of plaintiff's play, to wit, the rescue of one character by another in danger of his life from a passing train, assuming it to have been taken and used by defendant, does not render him liable for a penalty under the statute.

XIV. That under the statute a recovery can only be had when the defendant has performed the whole play claimed to have been copyrighted or substantially the whole.

XV. That there is no evidence of any damage sustained by the plaintiff from the alleged wrongful performances of defendant.

XVI. That the performances claimed to have been given were so given intermediate the decision of the circuit court, holding that the plaintiff had no copyright whatever, and the decision of the circuit court of appeals, reversing that ruling, and the defendant gave no performances in violation of the statute or knowingly violated plaintiff's rights nor did so in reckless disregard of plaintiff's rights.

XVII. This defendant is not liable to a penalty, having given the performance claimed to have been wrongfully given only
184 after the circuit court had judicially determined in the suit in equity, that the plaintiff had no copyright, and that the defendant and his codefendants in that suit had a right to use not only the incident in plaintiff's play but the whole thereof, and no performance was given by the defendant of any portion of plaintiff's scene or play after the decision of the circuit court of appeals in the equity suit.

XVIII. That the plaintiff having commenced an action in equity to recover profits had elected to claim profits and cannot, therefore, recover damages or penalty.

XIX. That in the suit in equity, plaintiff was entitled to recover all profits down to the entry of the decree in that suit and elected to proceed with an accounting and cannot, after such election, commence an action at law for damages or penalty.

XX. That the prior decree in the equity suit is *res adjudicata* on the question of damages.

XXI. That the plaintiff had his election when he commenced his suit in equity to have an accounting of the profits of all performances given prior to the final decree or to forego the profits and sue at law, and having elected in the equity suit to demand profits on an accounting and having proceeded with the accounting, he has made his election and cannot thereafter sue for a penalty or damages in this action.

XXII. That the plaintiff's claim is barred by the statute of limitations, his right to recovery being limited to performances given within two years prior to the commencement of the action.

XXIII. That in no event can the plaintiff recover for any performances given more than two years prior to the commencement of the action.

Motion denied, to which defendant then and there duly excepted.

185 It was consented that the papers may be put in evidence and marked as plaintiff's exhibits:

1 A, bill of complaint in Daly *v.* Webster.

1 B, answer to bill of complaint in said case.

1 C, replication to answer in said case.

The court took the matter under advisement and thereupon and on the 24th day of June, 1895, filed its decision as follows:

Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY.

This action having come on regularly for trial before the circuit court of the United States for this district, on May 29, 1895, and the parties, by their attorneys of record, having filed with the clerk a stipulation in writing signed by them, waiving a jury and consenting that the issues should be tried by the court without a jury, * * * I, holding said court and presiding therein, thereupon took the proofs offered by the respective counsel and hereby make the following special findings of fact and conclusions of law:

Findings of Fact.

I. That before August 1, 1867, the plaintiff invented and composed and was the author of a dramatic composition or play in five acts, entitled, "Under the Gaslight," which play was original with him.

186 II. That on the first day of August, 1867, the plaintiff being a citizen and resident of the United States of America, and being then the sole and exclusive proprietor and owner of said dramatic composition, and the same then never having been printed, published, acted, performed or represented, took out a copyright therefor in the United States by depositing a printed copy of the title, viz:

"Under the Gaslight.

A romantic panorama of the streets and homes of New York,"

of said composition in the clerk's office of the district court of the United States for the southern district of New York, of which district the plaintiff was then a resident, and in all respects complied with the provisions of the existing acts of Congress relating to copyrights, and received from said clerk, who then and there recorded

said title, as required by said acts, a certificate and record in the form required by such acts, containing the title of said composition, and that the said Daly has been continuously since the said day the sole and exclusive proprietor of said dramatic composition and of said copyright.

III. That the plaintiff subsequently and within a reasonable time thereafter, caused said composition to be printed and published, and within three months from the date of such printing and publication he caused *to be* printed *a* copy of said composition so printed and published to be delivered to and deposited with the clerk of said district court, and also to be delivered to and deposited in the Library of Congress at Washington, for the use of said library, as required by said acts of Congress. The title as published was:

"Under the Gaslight.

A totally original and picturesque drama

OF

Love and life in these times."

187 IV. And that the plaintiff gave information of the copyright of said composition being secured to him by causing to be printed and inserted in the several copies of each and every book and edition of such book or composition so published and printed, on the title page thereof or on the page immediately following, the following words, viz:

"Entered according to act of Congress, in the year 1867, by Augustin Daly, in the clerk's office of the district court of the United States for the southern district of New York."

V. That the plaintiff, in and by the aforesaid proceedings, intended to obtain, hold and possess, and did obtain, hold and possess, by virtue of the act of Congress approved February 3, 1831, and the acts amendatory thereof and supplementary thereto, not only the sole and exclusive right and liberty to print and publish such dramatic composition and book, but also the sole and exclusive right to act, perform, or represent the said dramatic composition or play, and to cause it to be acted, performed, or represented on any stage or public place during the whole period for which the said copyright was obtained.

VI. That the said play was produced by the plaintiff as alleged in the complaint, and has been often produced by him and for his profit and advantage by his employees or by persons licensed to procure the same; and the plaintiff has received as fees from different persons performing the same under his license, substantial license fees in almost every year since 1868.

VII. That the cause of the success and profit of the play was the scene and incident in the end of the third scene of the fourth act of the said composition, commonly called, after being so pub-
188 licly performed, the railroad scene or sensation, in which one of the characters in said composition is represented as secured by another of the characters and laid helpless upon the rail

of a railroad track in such a manner and with the presumed intent that the railroad train momentarily expected shall run him down and kill him, and just at the moment when such a fate seems inevitable, another of the characters in the composition contrives to reach the intended victim and to drag him from the track as the train rushes in and passes over the spot.

VIII. That this incident and scene, as thus carried out, was novel and unlike any dramatic incident known to have been theretofore represented on any stage or invented by any author before the plaintiff.

IX. That the chief value of said composition and its popularity depend upon the said railroad scene or sensation contained in it, and upon the representation of said scene, only, which scene constituted its essential feature; and that at the times of the acts of the defendant hereinafter referred to the sole commercial value of the play of "Under the Gaslight," and the source of its power of earning royalties, consisted of the said railway scene.

X. That soon after said play was produced, Dion Boucicault, a native and subject of Great Britain, without the knowledge or consent of the plaintiff, prepared a play called "After Dark," in which he introduced a railway scene varying slightly from the railway scene as it appeared in "Under the Gaslight," so as to be colorably different, but substantially the same, as alleged in the complaint.

XI. The defendant, William A. Brady, is and at the times hereinafter mentioned was a manager and actor. The plaintiff was at the commencement of this suit a citizen of the State of New York, and the defendant was a resident therein, whose citizenship
189 was not averred, and this court obtains its jurisdiction, not by reason of diverse citizenship, but solely under the copyright laws of the United States.

XII. The defendant, at the times hereinafter mentioned, without the consent of the plaintiff, produced and procured to be publicly performed and represented, in divers cities, the said play "After Dark," including the said railway scene, which, as produced by the said defendant, was substantially the same, although colorably different from the plaintiff's play of "Under the Gaslight," as alleged in the complaint.

XIII. That the said play "After Dark" has been publicly produced and represented by the said defendant and his agent in different parts of the United States without the plaintiff's consent, and that such performance and production of the said play took place seven hundred and forty-seven times (747) between June 19, 1889, and October 4, 1892, and that of the said seven hundred and forty-seven (747) performances one hundred and fifty-six (156) took place in or after August, 1891, and within two years of the commencement of this action, which was commenced August 23, 1893. All the evidence upon the subject of the number of those performances was obtained from the defendant, by the plaintiff's examination of him, in the accounting before the master in the equity suit hereinafter mentioned.

XIV. That the plaintiff had required and received a license fee for

the production of the said railway scene prior to the said infringement by the defendant. Said license fees were not uniform, they diminished as the play, in process of time, became more familiar to the public. Ten dollars for each performance of the said railway scene was the smallest and most recent fee that had been paid, and was a reasonable royalty for the defendant to have paid for the use thereof.

190 XV. That a portion of the royalties received by the plaintiff for the production of "Under the Gaslight" prior to the said infringements by the defendant were for the use of this scene alone.

XVI. On May 20, 1889, the plaintiff brought a suit in equity against George P. Webster, William A. Brady, the present defendant, and Henry C. Miner, in the circuit court of the United States for the southern district of New York, in which he prayed that they should be enjoined against the further performance of said play of "After Dark," upon the ground that such performance or representation was an infringement of the copyright, and for an accounting of all money and profits received from or by reason of the performances of the play "After Dark" and of the railway scene therein.

That said court on June 19, 1889, denied the plaintiff's motion for an injunction *pendente lite*, after an appearance of the defendants and a hearing upon said motion, upon the ground that there was a material variance between the registered title and the published title of "Under the Gas Light," and that therefore the complainant had not a valid copyright.

After proofs had been taken on the issues joined, the circuit court for said district followed the decision of the court upon the said motion and dismissed the bill, with costs, on November 4, 1891.

An appeal was taken by the plaintiff from the decree dismissing the complaint to the circuit court of appeals, which court on the 4th day of October, 1892, reversed the decree of the circuit court, and remanded the cause with instructions to enter the usual decree for an accounting and perpetual injunction. That the said circuit court held that the complainant's copyright was valid and had been infringed by the defendants in said play "After Dark" by placing a character on the railroad tracks in apparent peril of his life from an approaching train, and having him rescued by another character.

191 XVII. Pursuant to said mandate a decree for a perpetual injunction by the circuit court was entered on November 5, 1892, and John E. Ward, Esq., one of the masters of said court, was directed to take proof of the number of performances given by the defendants and where each performance took place, and the defendants being directed to attend with their books and papers. That the defendant did attend, pursuant to the said decree of the said court before the master and gave evidence for the plaintiff. Upon said examination the defendant's counsel objected to the defendant being compelled to produce the manuscript play of "After Dark" upon the ground that "neither the defendant nor his books can be used against him in any proceeding wherein it is sought to

obtain a penalty or for the purpose of this hearing before the master." The decree did not direct the master to ascertain anything in regard to profits. No evidence was offered upon the subject and no finding was made thereon.

A final decree in said cause, accepting the master's report and making the findings of the master the findings of the court, was entered April 1, 1893. No judgment or decree for profits was asked for or rendered.

Conclusions of Law.

1. That the copyright of the dramatic composition entitled "Under the Gas Light," obtained on August 1, 1867, by Augustin Daly, being the copyright referred to in the complaint herein, is good and valid; that said railway scene is covered and protected by said copyright.

2. That the acts of the defendant were in disregard of said copyright and violated the plaintiff's exclusive rights thereunder by producing publicly and representing, without the plaintiff's consent, a colorable imitation of the substantial and material por-
192 tion of said "Under the Gas Light," and by using and producing the railway scene as copyrighted in the dramatic composition entitled "Under the Gas Light."

3. That section 4966 of the Revised Statutes confers upon the courts of the United States their only jurisdiction in an action between citizens of the same State, for the recovery of damages for the unauthorized public performance and representation of a dramatic composition for which a copyright has been obtained (Boucicault *v.* Hart, 13 Blatchf., 47).

4. That all actions at law in the courts of the United States, between citizens of the same State, by a proprietor of a copyrighted dramatic composition, for the recovery of moneys as damages or penalties against a person who, without consent, has given public representations of such composition, are controlled by the provision of section 4966.

5. That the evidence does not authorize an increase of damages above the minimum amount provided by said section, and that the court in this suit has no power to establish a rule of damages for any representation or set of representations below the minimum provision of the statute.

6. If section 4966 is to be construed as a penal statute, the only testimony in this case in regard to the number of representations, which was the testimony of Brady in the accounting and the master's report which is based solely upon the evidence given by the defendant before him in the equity suit, was inadmissible upon the ground that evidence obtained from a party by means of a judicial proceeding must not be used against him for the enforcement of a penalty.

Johnson *v.* Donaldson, 18 Blatchf., 287.

193 Such evidence can be used in the aid of the recovery of damages in a suit at law.

Atwill *v.* Ferrett, 2 Blatchf., 39.

7. Section 4966 declares that the person who violates its provisions shall be liable to damages, which are in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance as to the court shall seem just. The amount is not to be measured by the pecuniary injury, but in all cases is to be the statutory sum, subject to be increased if the circumstances of aggravation or of injury or of willfulness, shall convince the tribunal that justice requires an increase.

The injury to the proprietor is but one element in the case. The phraseology of the section suggests a punitive rather than a remedial purpose, and the phraseology of the statute as originally passed in 1886 (4 Stats. at Large, 138), conveyed the same suggestion that a penalty was to be inflicted rather than that a recompense for the injury was to be obtained. The general intent of Congress, apart from the proceedings in equity and from actions at law for damages for the unauthorized publication of manuscript (sec. 4967), seems to have been to enforce the copyright laws by penalties and forfeitures, rather than by the ordinary common-law remedies.

Section 4968 provides a limitation of two years for actions for forfeitures and penalties. If section 4968 is not a penalty no Federal statute of limitations is applicable, and it can hardly be supposed that it was the intent of Congress to permit so serious a statutory rate of damages to run without Federal statutory limitation. The damages in the corresponding section of the English copyright statutes (3 and 4 William, 14 and 15, sec. 2), in which
194 damages of forty shillings were the minimum, are regarded as a penalty.

Chatterton *v.* Cave, 3 Appeal Cases, 489.

My conclusion is that the section is penal rather than remedial in its character.

8. That there has been in this case no accounting of profits and no election to endeavor to obtain profits for any representation of the dramatic composition which is the subject of this suit, and that there has been no finding and no adjudication upon the subject of profits.

9. That if the master's report or the evidence upon which it was based, had been admissible, the plaintiff would have been entitled to a judgment against the defendant in the sum of fifty dollars for each performance falling within the period of two years prior to the commencement of this action, that is to say, for one hundred and fifty-six performances, the sum of $7,800, but that there was no adequate testimony before the court upon which to found a judgment for the plaintiff, and that, as the case now stands, the defendant is entitled to judgment with costs.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) United States circuit court, southern dist. of N. Y. Augustin Daly *vs.* William A. Brady. Findings of fact, &c. Shipman, C. J. U. S. circuit court. Filed Jun- 24, 1895. John A. Shields, clerk.

195 On the 6th day of August, 1895, the plaintiff gave notice of a motion as follows, and based upon the following affidavit:

Circuit Court of the United States, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

On reading the annexed affidavits of Stephen H. Olin and Richard Dorney, on the plaintiff's exceptions to the decision filed by the court herein, and on all the pleadings and proceedings herein, let the defendant or his attorneys show cause before me at the circuit court jury-room, for the trial of jury cases, in the United States court building, in the city of New York (room 43), on the second Monday of October, 1895, at 3.30 o'clock in the afternoon of that day, why an order should not be made directing a new trial of the above-entitled action, and why the plaintiff should not have such other and further relief as may be just.

And in the meantime, and pending the determination of this motion, let the defendant and his attorneys be stayed from all proceedings herein.

Service of this order and of copies of the annexed affidavits shall be sufficient if made upon the defendant's attorneys on or before the 15th day of August, 1895.

Dated 3d August, 1895.

N. SHIPMAN,
Circuit Judge.

196 Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
against
WILLIAM A. BRADY.

CITY AND COUNTY OF NEW YORK, *ss:*

Stephen H. Olin, being sworn, says:

I am one of the attorneys and counsel for the plaintiff above named. When the issues in this action were called for trial on the 29th day of May, 1895, counsel for the defendant suggested that a jury should be waived because the questions to be considered were only questions of law, and many of them were of a novel character. To this I assented and the trial proceeded before the Hon. Nathanial Shipman, J., without a jury.

When the record in the case of Daly *vs.* Webster and Brady was offered in evidence by me it was admitted by the court with this remark:

"The COURT: I will overrule the objection and admit the record. I think it is admissible for certain purposes. Whether it is admis-

sible for the purpose to which you have mainly directed your argument will be considered by and by when we find out what the nature of this statute is—whether it is penal in its character, or whether it is merely a declaration by Congress in regard to the proper amount of damages."

I believed that this action was an action for damages, and
197 could be sustained without reference to the clause in the statute which was alleged to be penal in its nature.

The decision of the court has taken me by surprise, and owing to the fact that the action was not tried before a jury, I have lost the opportunity of offering other evidence to show the unauthorized performances by the defendant, which I could have offered if the master's report and decree thereon had been excluded. I did not offer such evidence, because I considered it cumulative and bearing upon a point which I believed the defendant did not propose earnestly to contest. My ground for this was partly the statement in defendant's answer in paragraph 14 thereof, and also, the statement in paragraph 15 of said answer, as follows:

XIV. "That the performances claimed in the complaint herein to have been given by the defendants and claimed to have been a violation of the rights asserted and claimed by the plaintiff in the play referred to in the complaint, were the same performances which were adjudged and decreed to have been no violation of plaintiff's rights or infringement upon any exclusive right of production in the play referred to in the complaint, and the performances complained of in the complaint herein are or have reference to the performances which the plaintiff claims were given of the play 'After Dark,' subsequent to the orders entered upon the decision of Mr. Justice Wallace, hereinbefore referred to, and the final decree dismissing the bill of complaint hereinbefore referred to, and after the adjudication by the circuit court of the United States for the southern district of New York, that the plaintiff had no exclusive right in the production of the play claimed by him, and that the performances of the play 'After Dark' was not a violation or infringement upon plaintiff's rights."

XV. "That in and by said suit and the proceedings taken
198 therein this plaintiff elected to sue for the profits made or claimed to have been made, and from the performances of the play 'After Dark,' because of the claim of the plaintiff that such performances violated and infringed upon the rights of the plaintiff in and to the play claimed by him and referred to in the complaint. That said performances for which profits were sued for and claimed by the plaintiff in the said suit, were the same performances as are alleged in the complaint herein to have taken place."

Another ground for my belief in this regard was the fact that Brady when examined before the master in the suit of Daly *vs.* Webster did not claim that he was privileged from testifying, and fully testified as to the performances by him of the play "After Dark." I am informed and believe that the performances of the play of "After Dark" by the defendant can be fully established by

evidence to which no objection can be taken. I believe that the substantial justice of the case requires a new trial.

Judgment, I am informed, has not yet been, but may at any time, be entered herein.

No previous application for this order has been made.

Wherefore deponent asks for an order to show cause why a new trial of this action should not be granted, and staying the defendant from all proceedings herein pending the determination of this motion.

STEPHEN H. OLIN.

Sworn to before me, this 31st day of July, 1895.

LUIS JAMES PHELPS,
Notary Public, County of New York.

199 United States Circuit Court for the Southern District of New York.

AUGUSTIN DALY
against
WILLIAM A. BRADY. } Affidavit.

CITY AND COUNTY OF NEW YORK, *ss:*

Richard Dorney, being duly sworn, says:

I am the business manager of Augustin Daly, the plaintiff herein, and have charge of the business interests of said plaintiff in the United States.

On the 1st day of August, 1895, I examined the programmes and press criticisms and clippings of the productions of the play of "After Dark," played by a company owned and directed by William A. Brady, the defendant herein. The said programme and press criticisms, &c., were for performances at People's theatre, in New York city, and were for the season of 1891 and 1892.

In said programmes and press clippings appeared the names of various actors who took part in said performances of "After Dark."

I am familiar with many of the programmes used by said William A. Brady and his agents during the seasons of 1889, 1890 and 1891 in the production of the play "After Dark" at various times and places, and noticed that several of the actors and actresses in the cast of said play of "After Dark," produced at said People's theatre, from 28th December, 1891, to 11th January, 1892, were former members of said defendant's company in the seasons of 1889, 1890 and 1891, and played in said play from year to year.

200 The addresses of many of said actors are known to me, and their testimony can be procured if a new trial of this action be granted. The names of some of the actors appearing on the programmes are William A. Brady, T. W. McConnell, Alfred Hastings, Dore Davidson, H. J. Jordan, Max Rosenburgh, E. H. Bender, Thomas Bates, Stanislaus Strange, E. L. Walton, Frank Richardson, E. J. McCullough, S. C. Blaine, J. C. Carter, John Mul-

lery, J. T. Frazer, Will Jackson, L. J. Case, Harry Little, Frank Hart, Jeremiah Murphy, J. M. Brophy, C. Lewis, James Keith, Marie Rene, Emma Bell, Nellie Horie, Laura Biggar, Esther Williams, Kate Handley, Lillian Lee, Kate Hardley, Edmund Collier, Stella Rees, Gail Forrest, James McAvoy, James J. Corbett and James Daly.

All of said actors from time to time, at various places and seasons, took part in the play of "After Dark," in which the railway scene and sensation were used.

I am informed and believe that the season of 1891 and 1892 of William A. Brady's company in the production of "After Dark," began at Trenton, N. J., on 13th August, 1891, and lasted for 26 consecutive weeks, ending on or about the 11th February, 1892.

RICHARD DORNEY.

Sworn to before me this 1st day of August, 1895.

LUIS JAMES PHELPS,

[L. S.] *Notary Public, County of New York.*

The motion was heard before Judge Shipman on the — day of —— at which time the defendant was heard by counsel and submitted and filed the following affidavit:

201 United States Circuit Court for the Southern District of New York.

AUGUSTIN DALY
against
WILLIAM A. BRADY.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

William A. Brady, being duly sworn, deposes and says: I am the defendant herein; this action was commenced by the service of the summons upon me on the 14th day of July, 1893, and is therefore pending for over two years.

The plaintiff well knew, from the answer which was interposed, that an issue was presented as to the alleged performances which, it was claimed and charged, I had given in alleged violation of plaintiff's alleged copyright; and I call attention to the 8th and 9th allegations of the complaint and the denial, contained in my answer, which is as follows: "He, the defendant, denies the allegations contained in the 8th and 9th paragraph of the complaint." And again in the second alleged cause of action, in which it is charged that certain performances were given by me as therein set forth (in paragraph 12 of the complaint), I call attention to my denial contained in the answer in paragraph 18th, so that the plaintiff must have known that one of the issues of the case, raised by the pleadings, was the alleged performances which, it was charged in the complaint, I had given.

I further say that the allegation of the answer referred to in the

moving paragraph, is an extract and small part of paragraph 14 of the answer, in which I set up the final decree in action
202 number one rendered upon final hearing in which I was careful to refer to the performances referred to in the complaint as "performances claimed in the complaint to have been given" and "claimed to have been in violation of the rights asserted and claimed by the plaintiff."

Throughout this litigation the contest as to the performances alleged and claimed to have been given by me was sharp and pointed, and at no time conceded or understood by counsel to have been conceded.

I was present at the trial of this case before the Hon. Nathaniel Shipman, circuit judge. Immediately upon the opening of counsel for the plaintiff, when he referred to the statute and to his claim that he would ask for a license fee of fifty dollars as applicable to the number of performances falling within two years from the commencement of this action and ten dollars a performance for the rest, one of my counsel, Mr. Gerber, moved to compel an election whether counsel proceeds upon the first cause of action for damages, or upon the second cause of action which it is alleged in the complaint is predicated upon the statute for a penalty, and the court stated that he would not decide that question right off because a decision of the motion to elect would be virtually deciding a good deal that the court did not want to decide then and the matter was taken under advisement to be decided when the case was finally determined.

Therefore the question was at the outset presented as to whether the case was founded under the theory of damages or a penalty under the statute. To sustain me in my assertion I beg to refer to the stenographer's minutes, pages 1 to 5 both inclusive, and make the same a part hereof.

When Mr. Olin offered in evidence the record of the suit in equity of Mr. Daly for an injunction and accounting of profits, the objection was immediately taken, among other things, that in the said action I was called as a witness for the plaintiff, and was
203 compelled to testify against myself; notwithstanding my counsel's objection, and that as said record rested in part upon said evidence so given, it would be compelling me to give proof against myself to admit the record. The same objection was taken in different form to the record, and I called attention to the 3d objection appearing on page 7 of the stenographer's minutes, and the fifth objection appearing on page 8 of the stenographer's minutes, in which the court and counsel's attention was called to the authority of Callaghan *vs.* Meyers, 128 U. S., 417. In that record which was offered in evidence the only proof as to the number of performances was that given involuntarily when I was called as a witness by the plaintiff and compelled to testify against myself, and upon page 9 of the stenographer's minutes it will appear that after the general objections a special objection was made as follows:

"Our special objection is to that part of the record which finds

on Mr. Brady's evidence thus taken against himself, the number of performances."

Thereupon my counsel read from the authority of Callaghan against Meyers and stated that he thought that that was absolutely controlling, and as appears from pages 9 and 10 of the minutes my counsel argued that question somewhat at length, so that there could be no doubt on the part of plaintiff's counsel before he rested his case just what the objection was and the importance and necessity of establishing the number of performances claimed to have been given by me.

I also called attention to the statement of plaintiff's counsel on page 11 of the minutes in which he says, "My friend also takes the objection that so far as this record shows the number of performances, it cannot be offered here on the ground that this is an action for penalty," and concluding his argument, counsel says, "It seems
204 to me perfectly obvious, without arguing the other question that the learned counsel has raised, that we are entitled to show by this record that there were a certain number of infringing performances, and then to proceed to offer evidence to show that we are entitled to ten dollars apiece for these performances."

The court admitted the record, but was careful to state, "I think it is admissible for certain purposes. Whether it is admissible for the purpose to which you have mainly directed your argument will be considered by-and-by when we find out what the nature of this statute is; whether it is a penalty in its character or whether it is merely a declaration by Congress in regard to the proper amount of damages."

Mr. Dittenhoefer then asked the court:

"I understand your honor does not pass upon the main question here?" To which the court replied: "Why, no." Mr. Dittenhoefer then stated: "It is simply admitted subject to such value as you may hereafter give to it?" And the court answered: "Yes."

And I refer to pages 12 and 13 of the stenographer's minutes. Counsel, therefore, could not have been misled by any ruling that the court made.

I further say that the objection to my being obliged to testify against myself was one that was raised at every stage of, not only this action, but the prior action.

I was subpœnaed as a witness by the plaintiff in order that my testimony could be compelled; I was subpœnaed to produce my books and also the manuscript of the play "After Dark," the object of which was to introduce in evidence the manuscript of the play "After Dark," which it was claimed and asserted was an infringement of plaintiff's alleged copyright, and to compel me, with the aid of my books, to testify to performances given of "After Dark."

Objection was raised immediately to the use of the said
205 books, or of the said manuscript and my testimony used upon the ground that I was being compelled to be a witness against myself, and was rendering myself liable to a penalty, and I call attention to the report of the master upon the accounting with the

stenographer's minutes annexed showing the objection taken. The objection was overruled by the master, and was overruled when the question came before Judge Lacombe, as I am informed and verily believe, because under the Callaghan case the objection is not applicable in an equity suit, as the decree in that suit does not award a penalty or forfeiture, and the evidence so obtained cannot be used in any other suit in which a penalty or forfeiture is sought.

I further say that I am acquainted with the persons named in the affidavit of Richard Dorney and that none of the said persons were present in court during the trial of this action. There were only a few persons in the room at the time of this trial in addition to the officers, counsel, their clerks and assistants; there were my witnesses and Mr. Richard Dorney. The plaintiff did not have on hand a single witness whom he failed to call on the question of performances alleged to have been given, and I repeat that not one of the individuals referred to in Mr. Dorney's affidavit was in court available as a witness or intended to be called as a witness.

I further say on information and belief that the plaintiff cannot prove through the said persons named in Mr. Dorney's affidavit the alleged performances claimed and charged to have been given by me and set forth in the complaint.

I further say that since the decision was filed plaintiff did on the 6th day of August, 1895, serve upon my attorneys, as I am informed by them and verily believe, exceptions to the decision, with notice of the filing of the same, for the purpose of compelling
206 and effecting a review by way of appeal from said decision.

WILLIAM A. BRADY.

Sworn to before me this 30th day of December, 1895.

H. G. WILEY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

In deciding said motion Judge Shipman filed the following opinion on the 4th day of November, 1895:

Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
v.
WILLIAM A. BRADY.

SHIPMAN, *C. J.:*

This case was tried by the court, a jury having been waived, and the record testimony which was offered was received, subject to the conclusion of the court in regard to its effect and admissibility. The court subsequently held that the testimony could not be used to subject the defendant to a penalty, and that the statute was penal in its character. The plaintiff, before judgment, moves for a new trial for the purpose of giving other testimony which, it is alleged, can be obtained, and which will prove the facts contained in the offered record.

The questions of statutory law involved in this case are im-
207 portant to both the parties, and the final decision by the appellate court upon all the accessible facts will be valuable to those interested in the law of copyright relating to dramatic compositions.

But the case ought not to be opened upon the ground of its general importance to that portion of the public which is interested in the subject of copyright. Unless the furtherance of justice, as between the parties, requires the allowance of the motion, it should be denied. It is undoubtedly a fact that a jury was waived because it was thought by counsel on both sides that the only questions to be considered were those of law, some of which were of novel character. The plaintiff's counsel did not, therefore, anticipate that the number of performances was to be seriously contested, and was perhaps misled into this opinion by the construction which he placed upon certain paragraphs in the answer.

It was, therefore, supposed that the facts were in compact compass, and that the trial before the court would be an argument upon sundry questions of law.

These circumstances take this motion out of the state of facts which ordinarily present themselves upon motions for the introduction of new testimony, and call upon the court to give the plaintiff an opportunity to present the facts of his case by competent testimony.

The motion is granted to the extent that the cause will be opened for the purpose of allowing either party to present additional testimony in regard to the number and times of the representations, if any there were, of the play of "After Dark" by the defendant within two years prior to the commencement of this suit.

The order will be settled upon notice.

(Endorsed:) U. S. circuit court, southern dist. of New York. Augustin Daly *v.* William A. Brady. Opinion, Shipman, C. J. U. S. circuit court. Filed Nov. 4, 1895. John A. Shields, clerk.

208 Thereafter and on the 15th day of November, 1895, the following order was made, to which defendant then and there duly excepted.

At a stated term of the United States circuit court for the southern district of New York, held at the United States court-house building, in the city of New York, on the 15th day of November, 1895.

Present: Hon. Nathaniel Shipman, circuit judge.

AUGUSTIN DALY, Plaintiff,
vs.
WILLIAM A. BRADY, Defendant.

On reading and filing the order to show cause dated 3d August, 1895, and the affidavits of Stephen H. Olin, dated July 31st, 1895, and Richard Dorney, dated August 1st, 1895, thereto annexed, and also the affidavit of William A. Brady, dated October —, 1895, and on reading the pleadings and proceedings heretofore filed herein;

and on hearing Stephen H. Olin, Esq., of counsel for the motion, and A. J. Dittenhoefer, Esq., in opposition thereto, it is, on motion of Olin, Rives & Montgomery, solicitors for the plaintiff,

Ordered that the motion for a new trial is granted to the extent that the cause is open for the purpose of allowing either party to present additional testimony in regard to the numbers and times of the representations, if any, there were of the play "After
209 Dark" by the defendant within two years prior to the commencement of this suit, and for the production of such testimony this cause is set down to be heard during the two weeks after January 6th, 1896.

N. SHIPMAN,
Circuit Judge.

On the 9th day of April, 1896, the parties and their attorneys and counsel appeared before this court, Honorable Nathaniel Shipman, circuit judge, presiding, and the following proceedings were had:

Plaintiff's counsel moved the case for trial, producing the order filed on the 9th day of November, 1895. Defendant's counsel stated that he demands a jury, and objects to going to trial without one.

Objection overruled. Defendant then and there duly excepted.

Plaintiff's counsel offers to read in evidence the deposition *de bene esse* of Harry Meredith.

The COURT: What was the reason for your taking this deposition?

PLAINTIFF'S ATTORNEY: He resides in Boston; the deposition was taken in Philadelphia. We have since been following him to see if at about the time this case came up it might be possible to obtain his presence here; we are informed and believe that the company that he is acting with is this week acting in Washington, consequently we cannot produce him for that reason.

The COURT: My impression is that if you take a deposition because a man lives more than a hundred miles from the place of the court, the presumption is, his residence continues. I think you are not bound to give affirmative evidence that he is not within the jurisdiction. That is my recollection.

PLAINTIFF'S COUNSEL: I offer to read in evidence the deposition of Harry Meredith.

Defendant's counsel objected to the same, on the ground
210 that it must be shown that the witness is not within this district and cannot be produced by subpœna; upon the further ground that it does not appear that the witness is not within the jurisdiction of the court, and subject to the process of the court, so that he may be present at the trial.

Objection overruled. Defendant's counsel then and there duly excepted.

PLAINTIFF'S COUNSEL: I now read the deposition of Harry Meredith.

DEFENDANT'S COUNSEL: We object to the reading of the deposition upon the following grounds:

I. That there is no jurisdiction shown for the taking of the deposition under section 863 of the United States Revised Statutes.

II. That the deposition, as well as the certificate of the commissioner, fails to show that the witness, being within the district, is about to go out of the district where the case is to be tried, to a greater distance than one hundred miles from the place of trial before the time of trial.

III. That there is no jurisdiction in the commissioner for the taking of the said deposition or reasons given either in the deposition of the witness or the certificate of the commissioner establishing a right in the plaintiff to take or use the said deposition under or pursuant to section 863 of the United States Revised Statutes.

IV. That the certificate of the commissioner shows that the witness Harry Meredith is about to go out of the district in which the cause is pending to a greater distance than one hundred miles from the place of trial, but the deposition itself is not taken in the district where the cause is to be tried, but in another district, to wit, the eastern district of Pennsylvania, in the third circuit.

211 V. That the proceeding being penal in its nature, the defendant has the right to be confronted in open court upon the trial of this case with the witnesses against him, and the cause cannot be heard or determined upon evidence contained in or taken by deposition.

VI. That the deposition is incompetent, immaterial, irrelevant and inadmissible.

VII. That the deposition was taken down in questions and answers by a stenographer, and not reduced to writing in the presence of the witness; nor read over to or by him, and is not properly taken under the Revised Statutes, sections 863–864, and is not admissible in evidence.

VIII. That the deposition could not be taken, inasmuch as the action has been sued and findings made and a decision rendered and filed, and that section 863 of the United States Revised Statutes does not apply in such a case.

IX. That there was no proper or sufficient order for the taking of the deposition.

X. That a deposition under the section of the statute can only be taken before the trial, if at all, and not pending the trial.

XI. That there was no sufficient proof that the witness is not now within the district and circuit where the action is — be tried, and able to attend or be compelled to attend the trial in person.

XII. Also upon the objections and grounds stated at the time when the deposition was taken.

VIII. Also that the evidence is inadmissible under the
212 pleadings; that the complaint does not set forth or allege the offense for which a penalty is sought and which this deposition seeks to establish.

Objection overruled. Defendant's counsel then and there duly excepted.

A motion had been made before the trial to suppress the deposition of Harry Meredith, which was denied.

At a special term of the U. S. circuit court, held — and for the eastern district of Pennsylvania, at the United States court-house, in the city of Philadelphia, on the — day of December, 1895.

Present: Hon. George M. Dallas, U. S. circuit judge.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM BRADY, Defendant.

On reading and filing the affidavit of George Austin Morrison, Jr., verified the 16th day of December, 1895, it is, upon motion for plaintiff,

Ordered, that a subpœna issue to Harry Meredith, the witness named in said affidavit, to be examined *de bene esse* before Samuel Bell, United States commissioner for the eastern district of Pennsylvania, at his office, post-office building, Philadelphia, Pa., on the part of the plaintiff, on the 18th day of December, 1895, at twelve o'clock, noon.

213 This order is made under section 863 of the Revised Statutes (on Foster's Fed. Pr., 275, p. 490), and upon the understanding that the defendant's counsel has waived the notice for which the statute provides.

GEO. M. DALLAS, *Cir. Judge.*

U. S. Circuit Court for the Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York,

Stephen H. Olin, being duly sworn, says he is a member of the firm of Olin, Rives & Montgomery, attorneys for the plaintiff; that he has had entire charge of the above-named action, and that he knows all the proceedings and facts in regard thereto; that the testimony of Harry Meredith is material and necessary for the plaintiff at the trial of this action; on information and belief that Harry Meredith is an actor now engaged in traveling and acting with the theatrical troupe known as Julia Marlow-Taber and Robert Taber troupe; that the said Harry Meredith is now playing an engagement at the — theatre, Philadelphia, Pa., said engagement ending December 14, 1895; that on information and belief, said

214 Harry Meredith is about to go out of the district in which the above-named cause is pending and to a greater distance than one hundred miles, to wit, Toledo, Ohio; that the actual residence of said Harry Meredith is unknown to deponent, but at the present time he is with said theatrical troupe in Philadelphia, Pa.;

that the deponent was only informed on December 13th of the whereabouts of said Harry Meredith, and that he took immediate steps to obtain an order of this court for the examination of said Harry Meredith *de bene esse*.

STEPHEN H. OLIN.

Sworn to before me this 13th day of December, 1895.

GEO. B. HEATH,
[SEAL.] *Notary Public, New York County.*

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record—

Do hereby certify, that Geo. B. Heath, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 13th day of December, 1895.

[SEAL.] HENRY D. PURROY, *Clerk.*

215 U. S. Circuit Court for the Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss:

George Austin Morrison, Jr., being duly sworn, says: I am a clerk in the office of Olin, Rives & Montgomery, the attorneys for the plaintiff herein. The above-entitled action is an action at law for the recovery of the statutory damages under the Revised Statutes of the United States for the infringement of plaintiff's copyright in a certain dramatic work or play entitled "Under the Gaslight." The summons herein was served on the 14th day of July, 1893, and the complaint herein was duly served on the 23d of August, 1893, and defendant duly served his answer on the 28th of December, 1894. The plaintiff's replication thereto was duly filed on the 21st of June, 1894. Thereafter the case was tried on the 29th of May, 1895, before Judge Shipman without a jury by stipulation, and judgment was rendered in favor of defendant. The plaintiff thereupon obtained an order to reopen the case and let in certain material and additional testimony. The said action is now pending

and set down for trial for the 6th of January, 1896. I have
216 had charge of this action and am familiar with all the facts in relation thereto.

GEORGE AUSTIN MORRISON, JR.

Sworn to before me this 13th day of December, 1895.

GEO. B. HEATH,
Notary Public, N. Y. Co.

[SEAL.]

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Henry D. Purroy, clerk of the city and county of New York and clerk of the supreme court for the said city and county, the same being a court of record—

Do hereby certify that Geo. B. Heath, before whom the annexed deposition was taken, was, at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 13th day of December, 1895.

[SEAL.] HENRY D. PURROY, *Clerk.*

217 U. S. Circuit Court for the Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss:

George Austin Morrison, Jr., being duly sworn, says: I am a clerk in the office of Olin, Rives & Montgomery, the attorneys for the plaintiff herein, and have had entire charge of the above-named action, and know all the proceedings and facts in regard thereto. The above-entitled action is an action at law for the recovery of the statutory damages under the Revised Statutes of the United States for the infringement of plaintiff's copyright in a certain dramatic work or play entitled "Under the Gaslight." The summons herein was served on the 14th day of July, 1893, and the defendant duly served his answer on the 28th of December, 1894. The replication of the plaintiff thereto was duly filed on 21st June, 1894. Thereafter the case was tried on the 29th of May, 1895, before Judge Shipman, without a jury by stipulation, and judgment was rendered in favor of defendant. The plaintiff thereafter obtained an order to reopen the case and let in certain material and additional testimony.

The said action is now pending and set down for trial for the
218 6th of January, 1896, in New York, when said testimony is

to be produced before the court. The testimony of Harry Meredith, the witness sought to be examined, is material and necessary for the plaintiff at the trial of this action; said Harry Meredith is an actor now engaged in traveling and acting with the theatrical troupe of Julia Marlowe-Taber and Robert Taber troups; that said Harry Meredith played an engagement at the — theatre, Philadelphia, Pa., ending December 14, 1895, and is now in the city of Philadelphia, Pa.

That on information and belief said Harry Meredith is about to go out of the district in which the above-named cause is pending and to a greater distance than one hundred miles, to wit: to Scranton, Pa., Syracuse, N. Y., Erie, Pa., and Toledo, Ohio; that on information and belief the actual residence of said Harry Meredith is in Boston, Mass., one hundred miles from the place of trial of the above-named action, but at the present time he is stopping with said theatrical troupe in Philadelphia, Pa., at the Irving house.

That on information and belief the said Harry Meredith will not be within the jurisdiction of the court on the 6th of January, 1896, the day set for trial, and that his examination *de bene esse* is absolutely necessary for the plaintiff.

GEORGE AUSTIN MORRISON, JR.

Sworn to before me this 15th day of December, 1895.

ALFRED MACKAY,
A Commissioner for Pennsylvania in New York.
Office and Post-office Address, the Mutual Life Building,
[SEAL.] *No. 59 Cedar Street, New York City, N. Y.*

219 U. S. Circuit Court for the Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

Take notice, that the deposition *de bene esse* of Harry Meredith, who is about to go out of the district in which the above cause is pending, and to a greater distance than one hundred miles, will be taken under section 863 of the Revised Statutes of the United States, and in accordance with the said statutes in such case provided, and in pursuance of the rules and practice of this court, before Samuel Bell, United States commissioner for the eastern district of Pennsylvania, at his office, post-office building, Philadelphia, Pa., on the 14th day of December, 1895, at five o'clock, said deposition to be read in evidence at the trial of the above-entitled cause on the part of plaintiff. You are invited to attend and cross-examine the witness.

Dated 13th of December, 1895.

Yours, &c., OLIN, RIVES & MONTGOMERY,
Plaintiff's Attorneys, 32 Nassau Street, New York City, N. Y.

To Messrs. Dittenhoefer & Gerber, att'ys for defendant.

(Endorsed:) Copy received Dec. 13, 1895. Dittenhoefer, Gerber & James.

220 U. S. Circuit Court for the Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

Take notice that the deposition *de bene esse* of Harry Meredith, who lives at a greater distance than one hundred miles from the city of New York, and who is about to go out of the district in which the above cause is pending, and to a greater distance than one hundred miles, will be taken under section 863 of the Revised Statutes of the United States, and in accordance with the said statutes in such case provided and in pursuance of the rules and practice of this court, before Samuel Bell, United States commissioner for the eastern district of Pennsylvania, at his office, post-office building, Philadelphia, Pa., on the 18th day of December, 1895, at twelve o'clock, noon, said deposition to be read in evidence at the trial of the above-entitled cause on the part of plaintiff. You are requested to attend and cross-examine the witness at this examination and any and all adjournments thereof.

Dated December, 1895.

Yours, &c., OLIN, RIVES & MONTGOMERY,
Plaintiff's Attorneys, 32 *Nassau Street, New York City, N. Y.*

To Dittenhoefer & Gerber, attorneys for defendant.

(Endorsed:) Copy received Dec. 16, 1895. Dittenhoefer, Gerber & James.

221 UNITED STATES,
Eastern District of Pennsylvania, } *ss:*

I, Samuel Bell, a commissioner appointed by the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit, under and by virtue of the acts of Congress, do hereby certify: That the reason for taking the foregoing deposition and the fact is that the witness Harry Meredith, as appears by the affidavit of Stephen H. Olin hereto attached, is about to go out of the district in which the foregoing cause is pending to a greater distance than one hundred miles from the place of trial.

I further certify, that due notification of the time and place of taking said deposition was made out and served upon Messrs. Dittenhoefer, Gerber & James, counsellors for the defendant William A. Brady, and which service has been admitted and is hereto annexed.

I further certify, that on the 14th and 18th days of December, A. D. 1895, I was attended by George Austin Morrison, Jr., Esq., and Stephen H. Olin, Esq., of counsel for the said plaintiff, and David Gerber, Esq., of counsel for defendant, and by the witness, who was of sound mind and lawful age, and the witness having

been by me carefully examined and cautioned and sworn to testify the whole truth, the deposition was taken down stenographically and afterwards written out, and the signature of witness being waived by counsel, I have retained the said deposition in my possession for the purpose of transmitting the same by mail to the court for which the same was taken.

I further certify, that I am not of counsel or attorney for
222 either of the parties in the said deposition and caption named, or in any way interested in the event of the said cause.

In testimony whereof I have subscribed my name and affixed my seal this — day of December, A. D. 1895.

SAMUEL BELL, [SEAL.]
Commissioner Circuit Court U. S.,
Eastern District of Pennsylvania.

(Endorsed:) Opened and filed by order of court this 21st day of January, 1896.

The deposition of Harry Meredith was then read as follows:

Deposition *de bene esse* of Henry Meredith, a witness on behalf of the plaintiff, taken before Samuel Bell, United States commissioner, at his office, room 9, third floor, U. S. court and P. O. building, Philadelphia, on Saturday, December 14, 1895, at 5 o'clock p. m., pursuant to notice hereto attached.

Present: Samuel Bell, U. S. commissioner; George Austin Morrison, Jr., Esq., counsel for plaintiff.

David Gerber, Esq., appears for the defendant specially and only for the purpose of objecting to the taking of the deposition pursuant to the notice addressed to Dittenhoefer & Gerber, and left with some clerk, Friday afternoon, December 13, at four forty, which notice was returned the following morning to the plaintiff's attorneys with a notice as follows: "We beg to return the annexed notice served upon us yesterday afternoon about four forty as being unauthorized and insufficient, and that we object to take or use any deposition which you propose to take or may take pursuant to said notice, as being without jurisdiction and unauthorized either by the
223 statutes or the rules of practice of the courts in actions of this character; and that the notice is insufficient and on its face does not show jurisdiction for the taking of the deposition in manner and form as proposed in said notice." He further objects specially to the taking of the deposition on the following grounds:

I. That no notice was given to the defendant nor his attorneys of record.

II. That no reasonable notice was given to the defendant of the taking of the deposition.

III. That the notice was only served about four forty p. m. yesterday afternoon, December 13th, in the city of New York.

IV. That no sufficient notice was given as provided for in section 863 of the United States Revised Statutes.

V. That on the face of the notice it appears that there is no jurisdiction or sufficient ground shown for the taking of the deposition.

VI. That the deposition cannot be taken outside of the district or circuit in which the action is pending.

VII. That the deposition cannot be taken under section 863 of the Revised Statutes, as this is a quasi-criminal action for a penalty in which the defendant is entitled to be confronted by the witness in court on the trial, and have the witnesses against him present before a jury.

VIII. That there is no order of any court or judge for the taking of the said deposition.

IX. That there is no reason why proceedings cannot be had under section 866 of the Revised Statutes.

224 X. That the witness does not reside more than one hundred miles from the place of trial.

XI. That the witness is not within the circuit and about to go to a greater distance than 100 miles from the place of trial before the time of trial.

XII. That the deposition cannot be taken, inasmuch as this action has been tried and findings made and decision rendered and filed, and that section 863 of the United States Revised Statutes does not apply in such a case.

XIII. The defendant has not had sufficient or reasonable time since the service of the notice, to prepare properly and sufficiently to cross-examine the witness.

HARRY MEREDITH, sworn by the commissioner to state the truth, the whole truth and nothing but the *the* truth. testified as follows:

My name is Harry Meredith. My occupation professional actor. My present address is Irving house, Philadelphia. I was in the employ of the defendant William A. Brady a portion of the season of 1891–'92, playing the character of "Old Tom" in "After Dark" which is the leading part. Cannot state the exact date when the season of 1891–'92 opened. The season of 1891–'92 began some time in the month of August. I played in the city of Boston during the season of 1891, and it was near the opening of the season, September or early in October. I cannot testify that I played in the city of Boston a week's engagement beginning August 31, 1891, and ending September 5, 1891. I am not sure it was as early as that. I had an idea that the time we played there was earlier; at the same time I do not know that it was not that date. I have my contracts with William A. Brady. They are in storage with my manuscripts and papers and would refresh my recollection.

225 The season began in Trenton, if I am not mistaken, but I do not know the date. I can state the principal towns. I can very nearly give the route the company took during the seasons of 1891–'92. I acted in Atlantic City. I did not act in Philadelphia from the 15th to the 22d of August. I am positive of that. I cannot say the date I acted in Boston in "After Dark." I do not

think it was the week beginning the 31st of August and ending the 5th of September. I could state the date from my memorandum.

Counsel for plaintiff states that he desires an adjournment to enable the witness to procure the memorandum from which he can testify as to the dates referred to in this examination.

Adjourned to Wednesday, December 18, 1895, at twelve o'clock.

PHILADELPHIA, *December* 18, 1895.

Present: Col. Samuel Bell, commissioner; Stephen H. Olin, Esq., and George Austin Morrison, Esq., for plaintiff; David Gerber, Esq., for defendant, and the defendant in person.

Mr. MORRISON: I offer the order of Judge Dallas returnable this day, and I ask Mr. Gerber to treat it as if he had had twenty-four hours' notice of the hearing under that order, to save us the trouble of adjourning, and bringing the witness, and coming here ourselves on another day.

Mr. Gerber states that, subject to all the objections which he has heretofore taken, as appears upon the record, he, reserving those objections, will not insist upon the twenty-four hours' notice as has been suggested by counsel for the plaintiff.

226 HARRY MEREDITH resworn, under the order of Judge Dallas.

Mr. Gerber states that he objects to the taking of the testimony as not properly taken; not in compliance with the statute or the rule of the court or the practice of the court.

Direct examination continued by Mr. MORRISON:

My permanent home is Boston if a traveling man may be said to have a permanent home, and I am traveling at present with Julia Marlow Taber and from Philadelphia I intend to go to Pittsburgh.

Q. Can you now fix more definitely the date of the beginning of the season of 1891 for the After Dark Company?

A. Yes, sir. I would like to recall part of the testimony that I gave on Saturday. I find by certain references and records that I was laboring under serious mistake and misapprehension. I testified that we did not play in Philadelphia in August and I have found that such is not the case; that we did play in "After Dark" here and I have been able to verify the dates.

Q. How long did you continue to play with the After Dark Company?

DEFENDANT'S COUNSEL: We object to the evidence on the ground that it is too general, incompetent, immaterial, irrelevant and inadmissible; that the evidence sought to be elicited by the question and the evidence itself is not specific and does not establish the infringement alleged in the complaint; that it does not establish the violation or violations or performance referred to in the complaint; that under the complaint only one penalty can be recovered and

that infringement is not sought to be established by this evidence and that the evidence must refer to specific time and place of alleged infringement.

Objection overruled. Exception by defendant.

227 A. From ten to twelve weeks during that season. That is about as near as I can say to that.

Q. And in what places did you play, stating as nearly as you can tell from recollection?

Objected to on same grounds. Objection overruled. Defendants then and there duly excepted.

A. Trenton, New Jersey; Atlantic City, New Jersey; Philadelphia, Baltimore, Boston. Then ensued a course of night and two-night stands through New England. The names of the towns I remember but the consecutive work of the company I cannot say positively about that. I know the different towns, but as to the order in which they followed each other I cannot testify positively.

Defendant's counsel moved to strike out answer upon the same grounds as set forth in the objection to the question. Motion denied, to which defendant's counsel then and there duly excepted.

Q. Name some of the towns.

Objected to upon the same grounds. Objection overruled, to which defendant's counsel then and there duly excepted.

A. There was Lynn, Manchester, Portland, Concord, Worcester, Lewistown, Haverhill, Biddeford, and towns of that class through New England.

Defendant's counsel makes the same motion to strike out the answer. Motion denied, to which defendant's counsel then and there duly excepted.

Q. Where was the company at the time you left it?

Same objection. Objection overruled, to which ruling defendant then and there excepted.

A. The week ended at Beaver Falls, Pennsylvania. That ended my connection with the company.

228 Same motion to strike out answer. Motion denied; to which ruling defendant then and there duly excepted.

Q. During this period how many performances were given a week?

Same objection. Objection overruled; to which ruling defendant then and there excepted.

A. From six to eight, possibly nine; I cannot say. I don't remember. The three matinees came in the class of theatres that give the three matinees in the week. Now, I don't remember playing in those theatres. This was Baltimore, or possibly here. I cannot say over eight; and for the night stands and week stands through New England, I don't know, I cannot say. There were over six; from six to eight is about all. I played "Old Tom" in

the play which is so important that I was starred and featured in it.

Q. Do you remember a scene in which a railway train is introduced—an underground railway train?

Same objection. Objection overruled; to which ruling defendant then and there duly excepted.

A. Yes, sir.

Same motion to strike out answer.

Q. Did Old Tom have any part in that scene?

Mr. Gerber makes the same objection to this question. Objection overruled; to which ruling defendant then and there excepts.

A. He broke through the brick-work of the tunnel and descended into the tunnel and threw the inanimate body from the track—the body of the young hero. The hero's name was Gordon Chumley.

229 This incident took place in what was described as the underground tunnel. There was a locomotive and a passenger car, if I remember rightly, in that act. It approaches the audience at right angles.

Q. And where is the body of Chumley laid with regard to that locomotive?

Same objection. Objection overruled; to which defendant's counsel then and there duly excepted.

A. Laid right on the track about the centre of the stage. The locomotive passes over the place after it has been vacated by the body.

Q. Can you in any way refresh your memory so as to give me more accurately than you have the date of the first performance and the last performance when you were with the company?

Same objection. Objection overruled; to which ruling defendant's counsel then and there duly excepted.

A. I remember it thoroughly when we were in Trenton and rehearsing. I remember the dive I had to take, and Mr. Brady said to jump in feet foremost. I had a great laugh over that.

Defendant's counsel moves to strike out the answer on same ground as previous motion to strike out. Motion denied; to which ruling defendant's counsel then and there duly excepted.

Q. What was the date of that?

Objected to on same ground. Objection overruled; to which defendant's counsel then and there duly excepted.

A. That was the two nights before Philadelphia; that is how I know it.

Q. Can you say what month or what day of the month that was?

Objected to upon the same ground. Objection overruled; to which defendant's counsel then and there duly excepted.

230 A. August 13th. I cannot fix the date when I left the company; I don't know. That was the end of the two weeks' night stands after leaving Philadelphia; that date I don't know.

DEFENDANT'S COUNSEL: We move to suppress the deposition and to strike out the evidence upon the same grounds stated when the deposition was offered in evidence and offered to be read; and also upon the ground that the evidence is not specific, does not set forth time or place when the alleged offence was committed; does not establish the infringement alleged in the complaint; does not establish the violation or violations covered by the complaint, and that the complaint does not refer to the infringement or infringements referred to by the witness, and that under the complaint only one penalty can be recovered and that is not set forth in the complaint, nor is the particular infringement sought to be established by the evidence of this witness, and that the evidence is too general, incompetent, irrelevant and inadmissable.

Objection overruled and motion denied, to which defendant's counsel then and there duly excepted.

Cross-examination by defendant's counsel:

I am with the Julia Marlow-Taber Company, a dramatic company travelling from place to place, and am in Philadelphia only temporarily, laying off this week. We played two consecutive weeks, and I am going to leave Philadelphia to play one week in Pittsburg and thence to and travel from city to city. I terminated my engagement with Mr. Brady because he gave me two weeks' notice, which was a discharge or equivalent to a discharge.

I was examined last Saturday and I testified upon the subject, and I have since corrected my testimony. I am now testifying from recollection in a great measure. My recollection has been verified by what I have found out in the most positive manner from
231 the records and the corroboration of records, records not shown me by plaintiff's attorney. I felt it my duty to free myself from anything like having borne false testimony, and I wanted to make sure of it, for that reason and no other; that had nothing to do with the attorney; he has not been of the slightest assistance to me.

The company opened in Trenton, but to that I did not testify at all. They played two or three nights' stands before opening here in Philadelphia. They opened in Philadelphia on the 15th of August and in Baltimore on the 24th of August, playing in Philadelphia at the People's theatre and in Boston at the Boston theatre. After Baltimore they opened in Boston the 31st.

Q. If they played a week in Boston that would take it to about September 7th?

A. Yes.

Q. Where did they play September 7th?

A. I don't know. I don't know where they played September 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th,

20th or 21st. I do not know a single date after that until the season closed. I do not know where the company played September 22d, 24th or 25th.

Q. Would that same answer apply down to the end of your engagement? You could not tell where they played?

A. I do not know anything about the dates.

Q. Can you tell the places?

A. Yes.

Q. Can you tell when they played at Bangor, if they played at all?

A. I do not know.

Q. Did they play at Bangor at all?

A. I do not know. That was one of the exceptions on the list I have seen. I was not sure about Bangor. I am sure I can call to mind now the fact that I went out riding with Mr. Corbett there.

Q. In Bangor?

A. In Bangor.

232 Q. When did they play at Bangor?

A. I don't know. It is by recalling hotels and localities more than the positive knowledge of the date that you are able to satisfy yourself of these things. I took part in every performance that was given by the company, with the exception of a few nights when Mr. Brady played the part. The scene with a railroad in it, I think, occurred in the fourth act.

The witness then described the order of the scenes.

Redirect examination:

The following occurred at the close of the taking of the deposition.

DEFENDANT'S COUNSEL: I renew the objections heretofore made, and move to strike out the entire testimony as not properly taken, not in compliance with the statute or rule of the court or practice of the court.

PLAINTIFF'S COUNSEL: Will you waive the signature of the witness to the testimony? We have the stenographer's minutes and it will trouble Mr. Meredith to bring him back.

DEFENDANT'S COUNSEL: Without waiving any of the objections heretofore made by me, I will not insist upon Mr. Meredith coming back to sign the testimony or deposition, and will waive his signing the deposition.

The following certificate is annexed to the deposition of the witness as read in evidence:

U. S.,
Eastern District of Pennsylvania.

I, Samuel Bell, a commissioner appointed by the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, under and by virtue of the acts of Congress, do hereby certify that the reason for taking the foregoing deposition,

and the fact is, that the witness Harry Meredith, as appears
233 by the affidavit of Stephen H. Olin, hereto attached, is about to go out of the district in which the foregoing cause is pending to a greater distance than one hundred miles from the place of trial.

I further certify that due notification of the time and place of taking said deposition was made out and served upon Messrs. Dittenhoefer, Gerber & James, counsellors for the defendant William A. Brady, and which service has been admitted and is hereto annexed.

I further certify that on the 14th and 18th day of December, A. D. 1895, I was attended by George Austin Morrison, Jr., Esq., and Stephen H. Olin, Esq., of counsel for the said plaintiff, and David Gerber, Esq., of counsel for defendant, and by the witness, who was of sound mind and lawful age, and the witness having been by me carefully examined and cautioned and sworn to testify the whole truth, the deposition was taken down stenographically and afterwards written out, and the signature of witness being waived by counsel, I have retained the said deposition in my possession for the purpose of transmitting the same by mail to the court for which the same was taken.

I further certify that I am not counsel or attorney for either of the parties in the said deposition and caption named, or in any way interested in the event of the said cause.

In testimony whereof I have subscribed my name and affixed my seal this — day of December, A. D. 1895.

SAMUEL BELL.

Plaintiff's counsel offered to read in evidence the deposition of George A. Kingsbury.

Defendant's counsel objects to the reading of the deposition upon the following grounds:

I. That there is no jurisdiction shown for the taking of the deposition under section 863 of the United States Revised Statutes.

234 II. That the deposition, as well as the certificate of the commissioner, fails to show that the witness, being within the district, is about to go out of the district where the case is to be tried to a greater distance than one hundred miles from the place of trial before the time of trial.

III. That there is no jurisdiction in the commissioner for the taking of the said deposition or reasons given either in the deposition of the witness or the certificate of the commissioner establishing a right in the plaintiff to take or use the said deposition under or pursuant to section 863 of the United States Revised Statutes.

IV. That the certificate of the commissioner shows that the witness Kingsbury is about to go out of the district in which the cause is pending to a greater distance than one hundred miles from the place of trial, but the deposition itself is not taken in the district where the cause is to be tried, but in another district, to wit, Minnesota.

V. That the proceeding being penal in its nature, the defendant

has the right to be confronted in open court upon the trial of this case with the witnesses against him, and the cause cannot be heard or determined upon evidence contained in or taken by deposition.

VI. That the deposition is incompetent, immaterial, irrelevant and inadmissible.

VII. That the deposition is taken down in questions and answers by a stenographer and not reduced to writing in the presence of the witness nor read over to or by him, and is not properly taken under the Revised Statutes, sections 863–864, and is not admissible in evidence.

235 VIII. That the deposition could not be taken inasmuch as the action has been sued and findings made and a decision rendered and filed, and that section 863 of the United States Revised Statutes does not apply in such a case.

IX. That there was no proper or sufficient order for the taking of the deposition.

X. That a deposition under the section of the statute can only be taken before the trial, if at all, and not pending the trial.

XI. That there was no sufficient proof that the witness is now within the district and circuit where the action is being tried and not able to attend or be compelled to attend the trial in person.

XII. Also upon the objections and grounds stated at the time when the deposition was taken.

XIII. Also that the evidence is inadmissible under the pleadings that the complaint does not set forth or allege the offence for which a penalty is sought, and which this deposition seeks to establish.

Objections overruled. Deposition admitted; to which defendant's counsel then and there excepted.

The following is the deposition read in evidence:

An order having been made by the circuit court of the United States for the district of Minnesota on the 20th day of January, 1896, for the taking of the depositions of George A. Kingsbury and Theodore L. Hayes, two witnesses in the above-entitled action, which said testimony is to be taken before Ambrose Tighe, United States commissioner for the district of Minnesota, at his office room 412 in the Manhattan building, in the city of St. Paul and State of

236 Minnesota, on the part of the plaintiff, on the 17th day of February, 1896, at eleven o'clock in the forenoon of said day, and the said parties, plaintiff and defendant, having appeared before said commissioner at the time and place named in said order, said plaintiff appearing by Charles E. Flandrau, his attorney, and the said defendant appearing specially by his attorney Charles Bechoefer, for the purpose of making certain objections, which are as follows:

I. That no notice was given to the defendant nor his attorneys of record.

II. That no reasonable notice was given of the taking of the deposition.

III. That the deposition cannot be taken outside of the district or the circuit in which the action is pending.

IV. That the deposition cannot be taken under section 863 of the

Revised Statutes as this is a quasi-criminal action for a penalty, in which the defendant is entitled to be confronted by the witness in court on the trial, and have the witnesses against him presented before a jury.

V. That there is no reason why proceedings cannot be had under section 866 of the Revised Statutes, and that this method is improper.

VI. That the witness is not within the circuit and about to go to a greater distance than one hundred miles from the place of trial before the time of trial.

VII. That the depositions cannot be taken inasmuch as this action has been tried and findings made and decision rendered and filed, and that section 863 of the Revised Statutes does not apply in such a case.

237 VIII. That no notice was given to the defendant or his attorneys of the application for the order to examine the witnesses; and the defendant's attorney gives notice that he proposes to insist upon his objections at the time of trial and to move to suppress the deposition.

IX. That the affidavit, which is the basis for the order of the court directing the taking of the deposition, was insufficient to confer jurisdiction on the court to make such order, and is insufficient to support the same; that the court, in making such order, did so without jurisdiction to make the same.

The said parties, appearing as aforesaid, said defendant waiving nothing hereby, stipulates as follows: It is hereby stipulated by and between the parties to the above-entitled action and their respective attorneys that the depositions of the witnesses Theodore L. Hayes and George A. Kingsbury to be taken in said action may be taken in shorthand by a stenographer to be selected by the commissioner taking the same, and that after the same are so taken they may be typewritten by said stenographer, and that the signatures of the said witnesses to said depositions are hereby waived and also the reducing to writing of the same deposition by the commissioner is hereby waived, and that said depositions so taken as aforesaid may be returned by the commissioner as the depositions of said witnesses, and shall have the same force and effect as evidence in said action as if the same had been taken in all respects according to the laws and rules of court governing the taking of such depositions, but subject to any other objections that may be properly urged against them, and without waiving the objections heretofore taken by the defendant. And the said parties so appearing as aforesaid mutually consent that the taking of said depositions be adjourned until Thursday, the 27th of February, 1896, at the office of said commis-

238 sioner, at 9.30 o'clock, a. m., without prejudice to any of the foregoing objections, and reserving all such objections.

February 27, 1896, the parties appeared pursuant to the last adjournment, and mutually agreed that the taking of said depositions be further adjourned under the same conditions to the third day of March, 1896, at 10 o'clock a. m., at the same place.

3d of March, 1896, the parties appeared pursuant to the last ad-

journment, and by consent the taking of the said deposition was again adjourned until the 4th day of March, 1896, at 10 o'clock a. m., at the same place, all previous objections being reserved.

Mr. GEORGE A. KINGSBURY, one of the witnesses on the part of the plaintiff, being first duly sworn by the commissioner, testified as follows:

My name is George A. Kingsbury and I reside in St. Paul, and have lived there about five years. Am local manager of Jacob Litt's opera-house; and in January, 1892, was treasurer at the Grand opera-house in St. Paul.

Q. At what time was that play performed at that theatre?

A. I have the record there in those books.

Q. Just get it, please.

At this time the attorney for the defense demands a right to examine the witness as to this record now produced and by whom the entries therein contained were made.

Plaintiff's counsel says he does not produce any record and will rely entirely on the recollection of the witness as to the facts he desires to prove.

A. About January, 1892.

Q. By what company was it performed?

A. A company under the management of William A. Brady. I saw the performance two or three times.

Q. State, if you please, what days of the month of January, 1892, that play was performed at your theatre.

239 DEFENDANT'S COUNSEL: We object to the evidence on the ground that it is too general, incompetent, immaterial, irrelevant and inadmissible; that the evidence sought to be elicited by the question and the evidence itself is not specific, and does not establish the infringement alleged in the complaint; that it does not establish the violation or violations or performances referred to in the complaint; that under the complaint only one penalty can be recovered and that infringement is not sought to be established by this evidence, and that the evidence must refer to specific time and place of alleged infringement.

Objection overruled, to which defendant's counsel then and there duly excepted.

A. The engagement commenced Sunday night, January 10, and was performed that entire week.

Q. Every night?

A. Yes, sir; every night, with two matinees.

Q. Could you state the names of the actors?

A. No, sir; I could not.

Q. Any of them?

A. No, not with any certainty.

Q. Have you got a programme that was issued by that company or by your theatre of that date?

A. Yes, sir.

Q. Will you produce it?
A. Yes, sir.

The attorney for the defense demands a right to interrogate the witness as to what knowledge he has as to the management that prepared or used the programme to which he refers.

By Mr. PALMER:

Q. By what management did you say this programme was prepared?
A. The management of William A. Brady, I suppose.

240 Mr. PALMER: That is mere guessing. I object to the witness producing the programme referred to.

By CHAS. E. FLANDRAU:

Q. Is that programme one of the records of the Grand opera-house where this play was performed in St. Paul?
A. Yes, sir.
Q. Is that the programme (pointing to it)?

A. The witness produces a book of programmes and shows the programme referred to.

Q. Is this programme of January 10, 1892, one of the files and records of that theatre at that time?
A. Yes, sir.
Q. This programme appears in a bound book, does it not?
A. Yes, sir.
Q. Entitled what?
A. "Grand Opera-house Play Bill, Season 1891–1892." A regular house programme bound together to make up the season.
Q. And this is the programme that was used at that time?
A. Yes, sir; to the best of my knowledge.

Plaintiff offers in evidence that part of the programme which states the play and the characters, being the programme of that date without the advertisements.

Objected to by defendant's counsel as incompetent and immaterial and on the further ground that no sufficient foundation had been laid and that it is hearsay.

241 *Programme.*

Entire week commencing Jan. 10.

William A. Brady's

Production of

Dion Boucicault's Most Successful Melodrama

After Dark.

In Five Acts.

Cast of Characters:

Old Tom, a boatman, formerly known as Frank Dalton, ... James M. Ward
Dicey Morris, Proprietor of the Silver Gambling Hell and Elysium Concert Hall..... .....Russell Bassett
Gordon Chumley, Captain in Light Dragoons, in love with Rose.... ....J. W. McConnell
Sir George Medhurst, under the assumed name of Hayward.....George Heath
Richard Knatchbull, alias Chandos Bellingham, a man about town..... .....W. T. Doyle
Poynter, on the force.... ....Jeremiah Murphy
Crumpets, owner of the night birds' rest.....Frank Murtha
Area Jack } Night Birds { ....J. F. Frazier
The Bargee } { ....F. C. Carter
Kiddie, a waif..... .....Little Mamie Murphy
Master of Ceremonies.....Frank Halt
Eliza, Sir George's wife.....Miss Carrie Clark Ward
Rose Edgerton, of Medhurst Grange. .....Miss Ella Hugh Wood

Synopsis.

Act I, Scene 1: The Central Railroad Station. Scene 2: The Home of Medhurst. Scene 3: The Silver Gambling Hell.

Act II, London by Night, Showing the River Thames and London Bridge. The Rescue.

242 Act III, Scene 1: Old Tom's Home under the Arches. Scene 2: Medhurst Grange.

Act IV, Scene 1: The Elysium Concert Hall, introducing the following specialties:

Kelly & Murphy

In a Scientific Set-to.

Sweeney & Ryland.

First appearance in America in three years.

Scene 2: The cellar. Scene 3: The railroad tunnel. Old Tom to the rescue.

Act V: Medhurst Grange.

Q. Did you see that performance?

A. Yes, sir; I saw it probably all through two or three times that week, the same as I see every other performance.

Q. Do you remember in any of the acts of seeing a railroad scene?

A. Yes, sir.

Q. About what act or scene do you think that came in?

A. It came in the fourth act.

Q. What scene?

Objected to by Mr. Palmer, calling the witness' attention to anything contained in the programme on the ground that it is incompetent.

Q. Will you give a brief description of that railroad-rescue scene as you remember it?

A. I remember the character of Old Tom in "After Dark." I also remember a similar character to Old Tom in "Under the Gaslight." My recollection is to the effect that the rescue was similar in both plays. I could not state, with any degree of accuracy, in just exactly which play the man was dragged off the track.

Q. You say that the railroad-rescue scene was similar in both plays, "After Dark" and "Under the Gaslight," now describe briefly what that scene was.

DEFENDANT'S COUNSEL: We object to the evidence on the
243 ground that it is too general, incompetent, immaterial, irrelevant and inadmissible; that the evidence sought to be elicited by the question and the evidence itself is not specific, and does not establish the infringement alleged in the complaint; that it does not establish the violation or violations or performances referred to in the complaint; that under the complaint only one penalty can be recovered, and that infringement is not sought to be established by this evidence, and that the evidence must refer to specific time and place of alleged infringement.

Objection overruled, to which defendant's counsel then and there duly excepted.

A. Well, my recollection of that scene is that there was a tunnel with a railroad in front of it, and after a great deal of conversation on the part of several of the characters, there was one man tied to the track and left there. The whistles were blown, and just before the train came on there was a noise like the breaking of a wall, and a character came in and grabbed this man off the track and the train went by.

DEFENDANT'S COUNSEL: We move to suppress the deposition and to strike out the evidence upon the same grounds stated when the deposition was offered in evidence and offered to be read; also upon the ground that the evidence is not specific, does not set forth time or place when the alleged offense was committed; does not establish the infringement alleged in the complaint; does not establish the violation or violations covered by the complaint, and that the complaint does not refer to the infringement or infringements re-

ferred to by the witness, and that under the complaint only one penalty can be recovered, and that is not set forth in the complaint, nor is the particular infringement sought to be established by the evidence of this witness; that the evidence is too general, incompetent, irrelevant and inadmissible.

244 Motion denied, to which defendant's counsel then and there duly excepted.

Cross-examined by Mr. PALMER:

Q. Between what dates were you treasurer under Mr. Bixby's management?

A. I was treasurer from April, 1890, until the summer of 1892.

Q. During that time and since that time you have seen, almost daily, different plays presented at that theatre?

A. Yes, sir.

Q. You don't mean to be understood that you carry from one year's end to the other the particular plays or dates of plays that are presented in your mind?

A. No, sir; I remember certain plays with certain effects.

Q. You cannot tell the exact dates?

A. Yes, sir; about the exact dates.

Q. Can you tell when you saw "Under the Gaslight"?

A. Yes, sir.

—. When?

A. During the summer season of 1893.

Q. You stated in your direct examination that you thought the railroad scene in "Under the Gaslight" and "After Dark" were somewhat similar, but you could not state in which one the character was bound to the track and rescued by a third person?

A. I think it was a similar scene. In other words, there were some features about the scene that were similar. For instance, there was a person in peril of his life, and he was saved. I recollect the exact manner of the rescue in one of the plays, but I cannot tell which one it was. I saw "After Dark" presented in St. Paul twice. Never in Minneapolis. I saw "Under the Gaslight" in St. Paul once. "After Dark" was last presented in St. Paul the week

245 commencing January 10th, 1892, but I do not know when it was first presented.

Q. In the statement that you have made, that this play "After Dark" was presented at St. Paul January 10, 1892, that knowledge is derived from the notations in this statement book, is it not?

A. Yes, sir.

At this time defendant's counsel moves to strike out each answer of the witness which in any way related to the date of the presentation of the play "After Dark" at the city of St. Paul during the month of January, 1892, on the ground that each answer is incompetent, immaterial and hearsay. This motion is made applicable separately and severally to each answer, and is also made to all his answers relating to this date as a whole. I also move to strike out the alleged programme, or such portions thereof as have been offered

in evidence, upon the ground that the same is incompetent and immaterial and not sufficient foundation laid for its admission.

Redirect examination by C. E. FLANDRAU:

Q. Mr. Kingsbury, in the testimony you have given as to this play, "After Dark," having been performed at the Grand opera-house at St. Paul, in January, 1892, and the general character of the attendance and receipts, and the description you have given of the rescue scene in the railroad scene, do you remember the facts you testify, and do you not speak from your own memory?

Objected to by Mr. Palmer upon the ground that it is leading and that it calls for the conclusion of the witness; that it is inconsistent with his former testimony and that it is not proper redirect examination.

A. Yes, sir; I do, excepting the rescue scene. I do not remember whether it was in "After Dark" or in "Under the Gaslight."

246 Q. I believe you say you saw both these plays?

A. Yes, sir.

Q. Is it, or is it not your recollection that the rescue scene was similar in both plays?

A. My recollection is that the rescue scene was similar in both plays.

Recross-examination by Mr. PALMER:

Q. Similar in the manner and to the extent that you have previously testified in your cross-examination?

A. Witness wants to know what his cross-examination was.

By Mr. PALMER: You stated that you recollected that there was some person placed upon a railroad track, and his life was in peril by reason of an approaching train, and that just before the train struck him he escaped. A character broke through a wall and took him off the track and the train went by.

Q. You say you don't recollect in which of these plays the character broke through the wall?

A. No, but it strikes me that they were very similar.

Q. Will you state what you mean by similar?

A. I mean that that particular scene in "Under the Gas Light," and in "After Dark" was similar.

Q. The whole scene did not consist of the breaking of a wall?

A. The climax is what I refer to.

Q. You say the character broke through the wall of a tunnel?

A. Yes, sir.

Q. You are sure that in "Under the Gas Light" there is a tunnel?

A. I am not sure that there was a tunnel, but I think it was a tunnel. There was an open space of some kind.

Q. In "Under the Gas Light" does not the third person break

from a switch-house near the track and rush out and release the bound form?

247 A. I don't remember what he breaks through, but he rushes out and takes the person off the track.

Q. You say you recollect the breaking of the wall of a tunnel was similar?

A. No matter where it came from, the rescue was similar in both plays, such as grabbing a person off the railroad track and the train goes by.

Q. Will you swear that in "After Dark" as the train approached the person who was on the track did not rise and stagger against the arm of a switch and switch the train?

A. I swear that I did not see anything of the kind.

Q. Did you see it played where the person rose and staggered off the rails just before the train approached?

A. I don't remember.

Q. But you do remember that in both these plays the rescue scene was similar?

A. The rescue scene was similar in both these plays "After Dark" and "Under the Gaslight."

Q. Why is it you remember that only the rescue scene was similar when before you stated that in both plays there was the breaking of the wall of a tunnel?

A. I don't remember in which play but I think it was in "After Dark" that the character broke through the wall. I won't swear that in both plays, the rescue was by a third person, but I think it was.

Plaintiff's counsel then offered to read in evidence the deposition of Theodore L. Hayes.

DEFENDANT'S COUNSEL: We object to the reading of the deposition of this witness upon the following grounds:

I. That there is no jurisdiction shown for the taking of the deposition under section 863 of the United States Revised Statutes.

248 II. That the deposition as well as the certificate of the commissioner fails to show that the witness being within the district, is about to go out of the district where the case is to be tried, to a greater distance than one hundred miles from the place of trial before the time of trial.

III. That there is no jurisdiction in the commissioner for the taking of the said deposition or reasons given either in the deposition of the witness or the certificate of the commissioner, establishing a right in the plaintiff to take or use the said deposition under or pursuant to section 863 of the United States Revised Statutes.

IV. That the certificate of the commissioner shows that the witness Theo. L. Hayes is about to go out of the district in which the cause is pending to a greater distance than one hundred miles from the place of trial, but the deposition itself is not taken in the district where the cause is to be tried, but in another district, to wit, the district of Minnesota.

V. That the proceeding being penal in its nature, the defendant has the right to be confronted in open court upon the trial of this

case, with the witnesses against him and the cause cannot be heard or determined upon evidence contained in or taken by deposition.

VI. That the deposition is incompetent, immaterial, irrelevant and inadmissible.

VII. That the deposition was taken down in questions and answers by a stenographer and not reduced to writing in the presence of the witness nor read over to or by him and is not properly taken under the Revised Statutes, sections 863–864, and is not admissible in evidence.

VIII. That the deposition could not be taken inasmuch as
249 the action has been sued and findings made, and a decision rendered and filed, and that section 863 of the United States Revised Statutes does not apply in such a case.

IX. That there was no proper or sufficient order for the taking of the deposition.

X. That a deposition under the section of the statute can only be taken before the trial, if at all, and not pending the trial.

XI. That there was no sufficient proof that the witness is not within the district and circuit where the action is being tried and able to attend or be compelled to attend the trial in person.

XII. Also upon the objections and grounds stated at the time when the deposition was taken.

XIII. Also that the evidence is inadmissible under the pleadings, that the complaint does not set forth or allege the offense for which a penalty is sought and which this deposition seeks to establish.

Objection overruled, to which defendant's counsel then and there duly excepted.

The deposition of Theodore L. Hayes was taken pursuant to the same order as the deposition of George A. Kingsbury, was taken before the same commissioner and at the same time and place and the same counsel present to represent the respective parties.

250 THEODORE L. HAYES, a witness on the part of the complainant, after having been duly sworn by the commissioner, testified as follows:

Direct examination:

My name is Theodore L. Hayes and I reside at Minneapolis. Am resident manager of the Bijou opera-house in Minneapolis. Have been such since September, 1890. I recollect the play being performed at that opera-house called "After Dark." It was performed twice, once in 1890 and once in 1892.

Q. How many performances do you think there was of the play in 1892 and in what month?

DEFENDANT'S COUNSEL: We object to the evidence on the ground that it is too general, incompetent, immaterial, irrelevant and inadmissible; that the evidence sought to be elicited by the question and the evidence itself is not specific and does not establish the infringement alleged in the complaint; that it does not establish the violation or violations or performances referred to in the complaint

that under the complaint only one penalty can be recovered, and that infringement is not sought to be established by this evidence, and that the evidence must refer to specific time and place of alleged infringement.

Objection overruled; to which defendant's counsel then and there duly excepted.

The answer of the witness was then read.

A. Ten performances of the play were given in 1892. In the month of January, commencing on the 17th of January and ending on the 23d; every night, including a matinee on Sunday, Wednesday and Saturday.

Q. Have you any knowledge of what company put the play on performance?

Objected to upon same grounds. Objection overruled; to which defendant's counsel then and there duly excepted.

251 A. The company was under the direction of William A. Brady.

Defendant's counsel moves to strike out the answer on the same grounds heretofore stated; also on the grounds that it is not responsive and that it is a conclusion; objection overruled; to which defendant's counsel then and there duly excepted.

Q. Did you see the performance?

A. Yes, sir; it would be hard for me to answer how often that week, but I should say two or three times. I remember a railroad scene in the fourth act, I think; as near as I can remember it there was a rescuing of a man from the railroad track by some one breaking through a wall seen in the rear. A railroad train rushes by. My memory is that the man was bound to the track and rescued just in time to save his life.

Cross-examination:

Q. You have recently refreshed your recollection, have you not, as to the date of this performance from some record?

A. As to the definiteness of the exact date; yes, sir. As to the general date, my memory was clear that this play was performed during the season of 1891 and 1892. Seasons commence in September and end the following June. I refreshed my recollection to fix the exact date from a statement book kept in my handwriting. The entries, following a rule instituted by our home office in Milwaukee, are made at the end of each week, making it necessary for us to make up a statement on Saturday. I would, of course, know whether the play was presented early or late in the season.

Q. Have you any independent recollection of the date, without refreshing your recollection?

A. The recollection I stated. The general recollection that the play was performed some time during the season of 1891–1892.

252 Q. Have you any distinct recollection of seeing this play "After Dark"?

A. Yes, sir.
Q. At this time?
A. Yes, sir.
Q. Did you see it in 1890?
A. Yes, sir.
Q. Do you recollect how this act IV was presented or played in 1890?
A. Only a general recollection that the performance was similar. There was no material change in the act in 1892 that I could see. I saw "Under the Gaslight" twice. First in 1888 at the Bijou opera-house in Minneapolis, and again in 1893, during the summer.
Q. Was there anything that would impress upon your mind the particular act of a particular play when it is similar to some other play?
A. I think it would; yes, sir.
Q. Now, if this act IV in "After Dark" was similar to an act in "Under the Gaslight," why would that make an impression upon your mind that you would carry for three years?
A. I think it would; yes, sir. The fact of a similar scene being introduced in another play would naturally cause it to be remembered.
Q. You don't mean to say that the scene in act IV in "After Dark" was incidentally the same as a scene in "Under the Gaslight"?
A. I mean to say this, if you will allow me to do so. That, according to my memory, there was some similarity between those scenes, enough to make me remember it. Now, as to the exact detail of the "After Dark" scene or "Under the Gaslight" scene, I cannot speak with accuracy. There are two different plays produced within a radius of four years, and the impression that these different productions would leave to a person testifying, places him in a rather hard position to testify to with complete accuracy.
253 There is no question in my mind but that there was a similarity, but to say that the man came through the wall in "Under the Gaslight" or came through the wall in "After Dark," I cannot testify fully. The main features of this scene in the two plays is the peril in which a human being's life is placed by reason of an approaching train, and the fact that that life is saved in some way.
Q. Now, beyond that, you have no definite recollection except that in one of these plays the individual's life was saved by some third person breaking through a wall, but as to which play the rescue was made in that manner, you are unable to state at this time?
A. I could not swear positively, but I remember that in whichever play that scene was introduced, there was a similarity of scenes between that and another play.

Redirect examination:

Q. Is it or is it not your recollection that this rescue scene was substantially similar in all its leading features in both "Under the Gaslight" and in "After Dark"?

A. I would not undertake to answer yes to that question, and I would say in explanation that the scenic environs of the two incidents being different in these two plays to some extent, I could not swear to the detail being the same. I have already testified that there was a similarity in the main features in the way I spoke of that, whichever play contained this scene in which a man is saved by being dragged from the railroad track, that the other play was similar in its main features.

UNITED STATES OF AMERICA,
State of Minnesota, County of St. Paul, } ss:

I, Ambrose Tighe, a United States commissioner in and for the State of Minnesota, duly commissioned, qualified and authorized to administer oaths and take and certify to examinations of
254 witnesses, testimony and depositions, do hereby certify, that pursuant to the annexed affidavit of George Austin Morrison, Jr., verified the 16th day of January, 1896, the order entered thereon on the 20th day of January, 1896, the notice of examination given to defendant's attorneys, and their admission, together with proof of service of the same, and the subpœna issued by virtue of the above order in the civil cause depending in the circuit court of the United States for the southern district of New York, in which Augustin Daly is plaintiff, and William A. Brady is defendant, I was attended at my office, No. 410 Manhattan building, in the city of St. Paul, Minnesota, by Charles E. Flandrau, of counsel for said plaintiff, and by Charles Bechhoefer, of counsel for said defendant, on the 17th day of February, 1896, at eleven o'clock in the forenoon, and again on the 27th day of February, 1896, at 9.30 a. m.; on the 3d day of March, 1896, at 10 o'clock a. m., and finally on the 4th day of March, 1896, at ten o'clock a. m., to each of which said days and times said matter was duly adjourned by consent of the parties to said proceedings; that at said time and place first named, to wit, on February 17, 1896, at eleven o'clock a. m., the defendant's counsel, Charles Bechhoefer, Esq., interposed certain objections to the proceedings, which are in the attached record set forth in full, and that in consenting to said continuance and adjournments, all of the objections previously interposed were expressly reserved. That at said last-named date, time and place, to wit, March 4, 1896, at 10 o'clock a. m., at my said office, the witnesses George A. Kingsbury and Theodore L. Hayes, each personally appeared before me, said witness- being of sound mind and lawful age; that said witnesses were by me first severally carefully examined, cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth, and they thereupon respectively deposed and testified to the matter set forth and shown, and that the respective deposi-
255 tions of each of them made and stated at said examination as above set forth were taken down in my presence and in the respective presence of each of said witnesses by my stenographer from the statements of said witnesses, and were then reduced to typewriting, and the respective approvals and subscriptions of the witnesses George A. Kingsbury and Theodore L Hayes each as to

his own deposition were waived by plaintiff's and defendant's counsel; that the said several examinations were taken at the place in the annexed notice and order specified, and at the time as set forth, adjournments being had or taken from day to day as provided for, and that all was so done, written and signed in the presence of said counsel for plaintiff and defendant.

I further certify that the reason- for taking said respective depositions were and are as follows, viz: That said George A. Kingsbury lives at St. Paul, Minnesota, at a greater distance from the place of trial than one hundred miles, and is out of the district in which the case is to be tried, to wit, the southern district of New York; that said witness, George L. Hayes, lives at Minneapolis, Minnesota, at a greater distance from the place of trial than one hundred miles, and is out of the district where the cause is to be tried, to wit, the southern district of New York.

I further certify that I am neither of counsel for nor attorneys to either of the parties to said suit, or interested in the event of said cause.

I further certify that it being impracticable for me to deliver said depositions with my own hand into the court for which they were taken, I have retained the same for the purpose of being sealed up by me, and speedily and safely transmitted by the United States mail to the said court for which they were taken, and to remain under my seal until there opened.

I further certify that the fees for taking said depositions, amounting to thirty-four and $\frac{75}{100}$ dollars, *has* been paid to me by
256 the plaintiff, and that the same is just and reasonable for the services performed.

Given under my hand, at the city of St. Paul, State of Minnesota, the 4th day of March, 1896.

AMBROSE TIGHE,
U. S. Commissioner, District of Minnesota.

At a special term of the U. S. circuit court held in and for the district of Minnesota, at the U. S. court-house, in the city of St. Paul, on the 20th day of January, 1896.

Present: Hon. R. R. Nelson, U. S. circuit judge.

AUGUSTIN DALY, Plaintiff,
vs.
WILLIAM A. BRADY, Defendant.

On reading and filing the affidavit of George Austin Morrison, Jr., verified the 16th day of January, 1896, it is, upon motion for plaintiff,

Ordered, that a subpœna issue to George A. Kingsbury and a subpœna issue to Theodore L. Hayes, two witnesses named in said affidavit to be respectively examined *de bene esse* before Ambrose Tighe, U. S. commissioner for the district of Minnesota, at his office, No. 410 Manhattan building, in the city of St. Paul, Minn., on the

part of the plaintiff, on the 17th day of February, 1896, at
257 11 o'clock in the forenoon. This order is made under section 863 of the Revised Statutes of the United States.

And let ten days' notice be given to Messrs. Dittenhoefer & Gerber, at 96 Broadway, New York city, the attorneys for the defendant, of the time, date and place of examination, the same being reasonable notice under the statutes.

R. R. NELSON, *Judge.*

Jan'y 20, 1896.

Please take notice that the within is a copy of the order this day duly entered and filed in the office of the clerk of the United States circuit court, district of Minnesota, at the court-house in the city of St. Paul, Minn.

Dated N. Y. city, 20th Jan'y, 1896.

Yours, &c., OLIN, RIVES & MONTGOMERY,
Att'ys for Pl'ff, 32 Nassau Street, New York City.

To Dittenhoefer & Gerber, E-qs., att'y- for def't.

UNITED STATES OF AMERICA, }
District of Minnesota, Third Division, } *sct:*

I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper-writing with the original thereof, which is in my custody, as such clerk, and that such copy is a correct copy of such original and of the whole thereof in the cause therein named.

Witness my hand as clerk and the seal of said court. Done at my office in St. Paul, Minnesota, this 21st day of January, A. D. 1896.

[SEAL.] OSCAR B. HILLIS, *Clerk,*
By LOUISE B. TROTT, *Deputy.*

258 United States Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } *ss:*

George Austin Morrison, Jr., being duly sworn, says: I am a clerk in the office of Olin, Rives & Montgomery, the attorneys for the plaintiff herein, and have had entire charge of the above-named action, and know all the proceedings and facts in regard thereto. The above-entitled action is an action at law for the recovery of the statutory damages under the Revised Statutes of the United States for the infringement of plaintiff's copyright in a certain dramatic work or play entitled "Under the Gaslight." The summons herein was served on the 14th of July, 1893, and the defendant duly

served his answer on the 28th of December, 1893. The replication of the plaintiff thereto was duly filed on the 21st of June, 1894. Thereafter the case was tried on the 29th of June, 1895, before Judge Shipman, without a jury, by stipulation, and judgment was rendered in favor of defendant. The plaintiff thereafter obtained an order from Judge Shipman to reopen the case and to let in certain material; necessary and additional testimony. The said action is now pending and set down for trial on the 6th day of April, 1896, when said testimony is to be produced before the court.

259 The testimony of George A. Kingsbury and Theodore L. Hayes, two witnesses sought to be examined, is material and necessary for the plaintiff at the trial of this action. Upon information and belief, said George A. Kingsbury lives at St. Paul, Minn., at a greater distance from the place of trial than one hundred miles and is out of the district in which the case is to be tried, to wit, the southern district of New York, and will be at a greater distance than one hundred miles from the place of trial on the 6th of April, 1896. That said Theodore L. Hayes lives at Minneapolis, Minn., at a greater distance from the place of trial than one hundred miles, and will be out of the district in which the case is to be tried, to wit, the southern district of New York, and at a greater distance than one hundred miles from the place of trial at the date of said trial. That on information and belief the said George A. Kingsbury and said Theodore L. Hayes will not be within the jurisdiction of the court on the 6th of April, 1896, the day set for trial, and that their examination *de bene esse* is absolutely necessary for and material to the plaintiff's case.

GEORGE AUSTIN MORRISON, JR.

Sworn to before me this 16th day of January, 1896.

ALFRED MARKEY,

[SEAL.] *Commissioner for State of Minnesota in New York.*

United States Circuit Court, District of Minnesota, Third Division.

The President of the United States of America to Theodore L. Hayes and George A. Kingsbury, Greeting:

You are hereby commanded to be and appear without ex-
260 cuse or delay before Ambrose Tighe, United States circuit court commissioner in and for the district of Minnesota, at his office, rooms 410–411 in the Manhattan building in the city of St. Paul, in said district, on the 17th day of February, A. D. 1896, at 11 o'clock a. m., then and there to testify and the truth to say, in a certain matter of controversy in said court, depending between Augustin Daly, plaintiff, and William A. Brady, defendant, on the part of said plaintiff, hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of January, in the year A. D. 1896.

Issued at my office in the city of St. Paul, under the seal of said circuit court, the day and year last aforesaid.

OSCAR B. HILLIS,
Clerk of said Circuit Court,
By LOUISE B. TROTT, *Deputy.*

[SEAL.]

C. E. FLANDRAU, *Attorney.*

UNITED STATES OF AMERICA,
District of Minnesota, } *ss:*

I hereby certify and return that I served the annexed subpœna on the therein-named witness Theodore C. Hayes by paying him his legal fees, to wit, the sum of $2.50, and by reading the same to him personally at Minneapolis, in said district, on the 29th day of January, A. D. 1896.

R. T. O'CONNOR,
U. S. Marshal,
By J. M. REDDING, *Deputy.*

Fees...	$1 84
Paid witness...	4 10
	$5 94

261 UNITED STATES OF AMERICA,
District of Minnesota, } *ss:*

I hereby certify and return that I served the annexed subpœna on the therein-named witness, George A. Kingsbury, by paying him his legal fees, to wit, the sum of $1.60, and by reading the same to him personally at Saint Paul, in said district, on the 29th day of January, A. D. 1896.

R. T. O'CONNOR,
U. S. Marshal,
By J. M. REDDING, *Deputy.*

U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

Take notice that the depositions *de bene esse* of George A. Kingsbury and Theodore L. Hayes, two witnesses, who live at a greater distance than one hundred miles from the city of New York at the present time, and who are now out of the district in which the above cause is pending and at a greater distance than one hundred miles will be taken under section 863 of the Revised Statutes of the United States, in accordance with the said statutes in such case provided, and in pursuance of the rules and practice of this court, before Ambrose Tighe, the United States commissioner for the dis-
262 trict of Minnesota, at his office, No. 410 Manhattan building, in the city of St. Paul, Minn., on the 17th day of February,

1896, at eleven o'clock in the forenoon, said depositions to be read in evidence at the trial of the above-entitled cause on the part of the plaintiff. This notice is given to you pursuant to an order made in the above-entitled cause and entered on the 20th day of January, 1896, a copy of which order, with notice of entry, is herewith served upon you. You are requested to attend and cross-examine the two witnesses at this examination and any and all adjournments thereof.

Dated 5 February, 1896.

Yours, &c., OLIN, RIVES & MONTGOMERY,
Attorneys for Plaintiff, 32 Nassau Street, New York City.

To Messrs. Dittenhoefer & Gerber, attorneys for defendant.

(Endorsed:) Copy received Feb'y 5, 1896. Dittenhoefer, Gerber & James.

263 U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

STATE OF NEW YORK,
City and County of New York, } ss:

Harry O. Dummer, being duly sworn, says: That he is of the age of eighteen years and upwards; that on the fifth day of February, 1896, between the hours of three p. m. and five p. m. he served the annexed order, affidavit and notice of examination on Messrs. Dittenhoefer & Gerber, the attorneys for the defendant in the above-entitled action, at their office, No. 96 Broadway, New York city, N. Y., by delivering true copies of the same to and leaving the same with said attorneys.

H. O. DUMMER.

Sworn to before me this 21st day of February, 1896.

ALFRED MACKAY,
Commissioner for State of Minnesota, in New York.

[SEAL.] Office and post-office address, the Mutual Life building, No. 59 Cedar street, New York city, New York.

264 UNITED STATES OF AMERICA,
State of Minnesota, County of Ramsey, City of St. Paul, } ss:

I, Ambrose Tighe, a United States commissioner in and for the State of Minnesota, duly commissioned, qualified and authorized to administer oaths and take and certify to examinations of witnesses, testimony and depositions,

Do hereby certify that pursuant to the annexed affidavit of George Austin Morrison, Jr., verified the 16th day of January, 1896, the order entered thereon on 20th January, 1896, the notice of exam-

ination given to defendant's attorneys, and their admission together with proof of service of the same, and the subpœna issued by virtue of the above order in the civil cause depending in the circuit court of the United States for the southern district of New York, in which Augustin Daly is plaintiff and William A. Brady is defendant, I was attended at my office No. 410 Manhattan building, in the city of St. Paul, Minn., by Charles E. Flandrau, of counsel for said plaintiff, and by Charles Bechhoefer, of counsel for said defendant, on the 17th day of February, 1896, at eleven o'clock in the forenoon, and again on the 27th day of February, 1896, at 9.30 o'clock a. m., on the 3d day of March, 1896, at 10 o'clock a. m., and finally on the 4th day of March, 1896, at 10 o'clock a. m.; to each of which said days and times said matter was duly adjourned by consent of the parties to said proceeding; that at said time and place first named, to wit, on February 17, 1896, at 11 o'clock a. m., the defendant's counsel, Charles Bechhoefer, Esq., interposed certain objections to the proceedings, which are in the attached record set forth in full, and that in consenting to said continuances and adjournments all of the objections previously interposed were expressly reserved. That at said last *said* named date, time and place, to wit, March 4,
1896, at 10 o'clock a. m., at my said office, the witnesses,
265 George A. Kingsbury and Theodore L. Hayes, each personally appeared before me, said witnesses being of sound mind and lawful age; that said witnesses were by me first severally carefully examined, cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth, and they thereupon respectively deposed and testified to the matter set forth and shown, and that the respective depositions of each of them made and stated at said examination as above set forth were taken down in my presence and in the respective presence of each of said witnesses by my stenographer from the statement of said witnesses, and were then reduced to typewriting, and the respective approvals and subscriptions of the witnesses George A. Kingsbury and Theodore L. Hayes, each as to his own deposition were waived by plaintiff's and defendant's counsel; that the said several examinations were taken at the place in the annexed notice and order specified, and at the time as set forth, adjournments being had or taken from day to day as provided for, and that all was so done, written and signed in the presence of said counsel for plaintiff and defendant.

I further certify that the reason- for taking said respective depositions were and are as follows, viz: That said George A. Kingsbury lives at St. Paul, Minn., at a greater distance from the place of trial than one hundred miles and is out of the district in which the case is to be tried, to wit, the southern district of New York; that said witness Theodore L. Hayes lives at Minneapolis, Minn., at a greater distance from the place of trial than one hundred miles, and is out of the district where the cause is to be tried, to wit, the southern district of New York.

I further certify, that I am neither of counsel for, nor attorneys to either of the parties to said suit, or interested in the event of said cause.

I further testify, that it being impracticable for me to de-
266 liver said depositions with my own hand into the court for which they were taken, I have retained the same for the purpose of being sealed up by me and speedily and safely transmitted by the United States mail to the said court for which they were taken, and to remain under my seal until there opened.

I further testify, that the fee for taking said depositions, amounting to thirty-four and $\frac{75}{100}$ dollars, has been paid to me by the plaintiff and that the same is just and reasonable for the services performed.

Given under my hand at the city of St. Paul, State of Minnesota, the fourth day of March, 1896.

AMBROSE TIGHE,
U. S. Commissioner, District of Minnesota.

DEFENDANT'S COUNSEL: We move to suppress the deposition of this witness, and to strike out the evidence upon the same grounds stated when the deposition was offered in evidence and offered to be read; also upon the ground that the evidence is not specific, does not set forth time or place when the alleged offence was committed, does not establish the infringement alleged in the complaint, does not establish the violation or violations covered by the complaint, and that the complaint does not refer to the infringement or infringements referred to by the witness, and that under the complaint only one penalty can be recovered, and that is not set forth in the complaint, nor is the particular infringement sought to be established by the evidence of this witness; that the evidence is too general, incompetent, irrelevant and inadmissible.

Motion denied, to which ruling defendant's counsel then and there duly excepted.

Plaintiff's counsel then offered to read in evidence the deposition of Nanine Palmer:

267 PLAINTIFF'S EXHIBIT "A."

United States Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

The witness, Nanina Palmer, having been subpœnaed for the trial this day, and being threatened with a sore throat which makes it dangerous for her to appear in court, it is hereby stipulated that her appearance in court is waived and that her deposition taken *de bene esse* may be read subject to all lawful objections.

Dated New York, April 6, 1896.

DITTENHOEFER & GERBER,
Att'ys for Def't.
OLIN, RIVES & MONTGOMERY,
Att'ys for Plaintiff.

(Endorsed:) U. S. circuit court. Filed Apr. 9, 1896. John A. Shields, clerk.

268 At a special term of the United States circuit court, held in and for the southern district of New York, at the U. S. court-house in the city of New York, post-office building, on the 7th day of February, 1896.

Present: Hon. E. Henry Lacombe, United States circuit judge.

AUGUSTIN DALY, Plaintiff,
vs.
WILLIAM A. BRADY, Defendant.

On reading and filing the affidavit of George Austin Morrison, Jr., verified the 7th day of February, 1896, it is, upon motion of Olin, Rives & Montgomery, attorneys for plaintiff,

Ordered that the clerk of the United States circuit court, southern district of New York, issue a subpœna to Mrs. Nanine Palmer, to be examined *de bene esse* before George B. Heath, a notary public in and for the city and county of New York, southern district of New York, at the Coleman house (Broadway and Twenty-seventh street), in the city of New York, on the part of the plaintiff, on the 10th day of February, 1896, at three o'clock in the afternoon.

This order is made in accordance with the practice of the southern district of New York, under section 863 of the Revised Statutes of the United States; and let one day's notice be given to Messrs.
269 Dittenhoefer & Gerber, at 96 Broadway, New York city, the attorneys for the defendant, of the time, date and place of examination, the same being reasonable notice under the statutes.

February 7, 1896.

E. HENRY LACOMBE,
U. S. Circuit Judge.

U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
vs.
WILLIAM A. BRADY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *City and County of New York,* } *ss.:*

George Austin Morrison, Jr., being duly sworn, says: I am a clerk in the office of Olin, Rives & Montgomery, the attorneys for the plaintiff herein, and have had entire charge of the above-entitled action, and know all the proceedings and facts in regard thereto.

The above-entitled action is an action at law for the recovery of the statutory damages under the Revised Statutes of the United States for the infringement of plaintiff's copyright in a certain dramatic work, or play, entitled "Under the Gaslight."

The summons herein was served on the 14th of July, 1893; and

the defendant duly served his answer on the 28th of December, 1893.

270 The replication of the plaintiff thereto was duly filed on the 21st of June, 1894.

Thereafter the case was tried on the 29th June, 1895, before Judge Shipman without a jury, by stipulation and judgment was rendered in favor of the defendant.

The plaintiff thereafter obtained an order from Judge Shipman to reopen the case, and to let in certain material, necessary and additional testimony.

The said action is now pending and set down for trial on the 6th day of April, 1896, when said testimony is to be produced before the court.

The testimony of Nanine Palmer, the witness sought to be examined, is material and necessary for the plaintiff at the trial of this action.

Upon information and belief, said Nanine Palmer lives at Chicago, Illinois, at a greater distance from the place of trial than one hundred miles, and her examination *de bene esse* is absolutely necessary for and material to plaintiff's case.

GEORGE AUSTIN MORRISON, JR.

Sworn to before me this 7th day of February, 1896.

LOUIS JAMES PHELPS,

[SEAL.] *Notary Public, County of New York.*

271 U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
vs.
WILLIAM A. BRADY, Defendant.

Take notice that the deposition *de bene esse* of Mrs. Nanine Palmer, a witness, who lives at a greater distance from the place of trial than one hundred miles, to wit, in the city of Chicago, Ill., will be taken under section 863 of the Revised Statutes of the United States, in accordance with the said statutes in such case provided, and in pursuance of the rules and practice of this court, before George B. Heath, a notary public for the city and county of New York, in the southern district of New York, at the Coleman house, Broadway and Twenty-seventh street, in the city of New York, N. Y., on the 10th day of February, 1896, at three o'clock in the afternoon; said deposition to be read in evidence at the trial of the above-entitled cause on the part of the plaintiff.

This notice is given to you pursuant to an order made in the above-entitled cause, and entered on the 7th day of February, 1896, a copy of which order, with notice of entry, is hereby served upon you.

272 You are requested to attend and cross-examine the witness at this examination, and any and all adjournments thereof.

Dated 7th February, 1896.

Yours, &c., OLIN, RIVES & MONTGOMERY,
Plaintiff's Attorneys, 32 Nassau Street, New York City.

To Messrs. Dittenhoefer & Gerber, defendant's attorneys.

(Endorsed:) U. S. circuit court, southern district of New York. Augustin Daly against William A. Brady. Affidavit and order. Olin, Rives & Montgomery, attorneys for plaintiff, 32 Nassau street, New York city. U. S. circuit court. Filed Feb. 7, 1896. John A. Shields, clerk.

Defendant's counsel waived the objection of the non-appearance of the witness, but objected to the reading of the deposition on the following grounds:

I. That there is no jurisdiction shown for the taking of the deposition under section 863 of the United States Revised Statutes.

II. That the deposition, as well as the certificate of the commissioner, fails to show that the witness being within the district is about to go out of the district where the case is to be tried to a greater distance than one hundred miles from the place of trial before the time of trial.

III. That there is no jurisdiction in the commissioner for the taking of the said deposition or reasons given either in the deposition of the witness or the certificate of the commissioner, establishing a right in the plaintiff to take or use the said deposition
273 under or pursuant to section 863 of the United States Revised Statutes.

V. That the proceeding being penal in its nature, the defendant has the right to be confronted in open court upon the trial of this case, with the witnesses against him, and the cause cannot be heard or determined upon evidence contained in or taken by deposition.

VI. That the deposition is incompetent, immaterial, irrelevant and inadmissible.

VIII. That the deposition could not be taken, inasmuch as the action has been sued and findings made, and a decision rendered and filed, and that section 863 of the United States Revised Statutes does not apply in such a case.

X. That a deposition under the section of the statute can only be taken before the trial, if at all, and not pending the trial.

XII. Also upon the objections and grounds stated at the time when the deposition was taken.

XIII. Also that the evidence is inadmissible under the pleadings that the complaint does not set forth or allege the offence for which a penalty is sought, and which this deposition seeks to establish.

Objections overruled. Deposition admitted, to which defendant's counsel then and there duly excepted.

The examination of this witness was taken *de bene esse* pursuant to an order permitting the examination of the witness to be taken

before a notary public, and pursuant to the order, and at the time and place stated in the order, the examination was taken, at
274 which were present plaintiff's counsel Stephen H. Olin, defendant, and his counsel David Gerber, and the notary named in the order.

DEFENDANT'S COUNSEL: I object to the taking of the deposition upon the grounds that section 863 of the Revised Statutes has not been complied with; that section 863 does not permit or justify an examination of this character in this action, and that the defendant is entitled to be confronted by the witness in open court before the court, this being a quasi-criminal action to recover a penalty.

NANINE PALMER, after having been duly sworn, testified as follows:

Direct examination by Mr. OLIN:

My home is Washington, D. C., and I am an actress acquainted with William A. Brady, and was in his employ.

Q. And with what company was it?

Objected to on the ground that if the engagement was in writing the best evidence is the contract, which should be produced, and the evidence is, therefore, incompetent. Objection overruled, to which defendant's counsel then and there duly excepted.

A. "After Dark." I am not prepared to swear when that season began. It was in 1892. The season opened in Atlantic City, I think. I played the leading part of Eliza. I continued with the company the latter part of the first week in January, and I continued to perform the leading part in the play while I was with the company. I can remember some of the places I appeared in.

Q. Give us a list of the places as far as you can remember.

DEFENDANT'S COUNSEL: We object to the evidence on the ground that it is too general, incompetent, immaterial, irrelevant
275 and inadmissible; that the evidence sought to be elicited by the question and the evidence itself is not specific, and does not establish the infringement alleged in the complaint; that it does not establish the violation or violations or performances referred to in the complaint; that under the complaint only one penalty can be recovered, and that infringement is not sought to be established by this evidence, and that the evidence must refer to specific time and place of alleged infringement.

Objection overruled, to which defendant's counsel then and there duly excepted.

A. We played in Norfolk, in San Francisco, California; in Texas, in Denison, in New Orleans.

Defendant's counsel moved to strike out the answer on the same grounds set forth in the objection to the question. Motion denied, to which defendant's counsel then and there duly excepted.

Q. Do you remember playing in Birmingham, Alabama?

A. In Savannah, I remember playing; also in Birmingham,

Alabama. I remember James J. Corbett appearing on the stage once when the company was performing during that season in New Orleans. I went to New Orleans before going to Texas.

Q. Do you remember about the time that this season began?

A. It was some time between the first and fifteenth of August.

Q. Do you remember the time when the change was made in the performance of what was known as the railroad scene?

A. Yes, sir; I do not remember distinctly what the change was. I simply remember that there was a switch made which I saw. Where that was I do not know. I cannot swear whether it was after we were in New Orleans. I do not remember what State it was in.

276 Q. During the time you were with the company how many performances were given in a week?

Objected to upon the same grounds as the objection heretofore stated, and that the witness has not given any special time or city where the performances were given. Objection overruled, to which defendant's counsel then and there duly excepted.

A. In what weeks do you mean?

Q. I should like to know what the average number was, and I should like to know what the smallest number was, if you know?

Objected to upon the same grounds. Objection overruled, to which defendant's counsel then and there duly excepted.

A. From six to eight, including matinees.

Q. Can you tell how the railroad scene was prepared before the switch was used?

A. No, sir, I could not. There was a track and I saw the train; that was all.

Q. Can you not tell me something more than that about it?

A. Well, yes; I saw the scene, but I could not tell when I saw it or where. It was during this period.

Q. Will you tell me how you saw it?

Objected to upon the same ground, to which defendant's counsel then and there duly excepted.

A. A man was thrown across the track and the old man rescued him.

Defendant's counsel moved to strike the answer out on the same grounds, and that it is not responsive to the question. Objection overruled, to which defendant's counsel then and there duly excepted.

277 Cross-examination:

Q. Were you on the scene which has been termed by the counsel as the "railroad scene"?

A. No, sir; neither was I on the scene before that, nor on the scene immediately before that. I was not in that act at all. The fact is, that the scene is darkened. I do not know whether there was an elevator used in that scene at any time. I did not see any. I

do not remember of any change being made in that scene excepting the change at the switch—the railroad switch, and that was changed: instead of a man rescuing the character, he gets up and grabs the switch and turns it, so far as I can remember. I cannot answer when that change was made.

Q. How often during the time you were with the company did you watch a performance of the play and of that particular scene?

A. As far as I can remember I do not think I watched it more than twice—probably three times. I do not know when or where. I cannot answer where I was performing in March, 1891, or in April, 1891. I feel sure I did not play in "After Dark" in 1891. I am prepared at the present moment to say that I was with "After Dark" in 1892; from recollection without refreshing my memory from papers or books I am clear about this. My contract with Mr. Brady was in writing. I performed in Norfolk in August, but cannot tell what month I appeared in Savannah. I cannot tell what month I appeared anywhere.

The reading of the testimony and signing thereof by the witness is waived.

278 At a general term of the United States circuit court, held in and for the southern district of New York, at the United States court-house, in the city of New York, post-office building, on the 7th day of February, 1896.

Present: Hon. —— ——, United States circuit judge.

AUGUSTIN DALY, Plaintiff,
vs.
WILLIAM A. BRADY, Defendant.

On reading and filing the affidavit of George Austin Morrison, Jr., verified the 7th day of February, 1896, it is, upon motion of Olin, Rives & Montgomery, attorneys for plaintiff,

Ordered, that the clerk of the United States circuit court, southern district of New York, issue a subpœna to Mrs. Nanine Palmer, to be examined *de bene esse* before George B. Heath, a notary public in and for the city and county of New York, southern district of New York, at the Coleman house (Broadway and Twenty-seventh street), in the city of New York, on the part of the plaintiff, on the 10th day of February, 1896, at three o'clock in the afternoon.

This order is made in accordance with the practice of the southern district of New York, under section 863 of the Revised Statutes of the United States; and let — days' notice be given to Messrs. Dittenhoefer & Gerber, at 96 Broadway, New York city, the
279 attorneys for the defendant, of the time, date and place of examination, the same being reasonable notice under the statutes.

February 7, 1896.

(Signed) E. HENRY LACOMBE,
U. S. Circuit Judge.

U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
vs.
WILLIAM A. BRADY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, } ss:

George Austin Morrison, Jr., being duly sworn, says:

I am a clerk in the office of Olin, Rives & Montgomery, the attorneys for the plaintiff herein, and have had entire charge of the above-entitled action, and know all the proceedings and facts in regard thereto.

The above-entitled action is an action at law for the recovery of the statutory damages under the Revised Statutes of the United States for the infringement of plaintiff's copyright in certain dramatic work, or play, entitled "Under the Gas Light."

The summons herein was served on the 14th July, 1893, and the defendant duly served his answer on the 28th of December, 1893.

280 The replication of the plaintiff thereto was duly filed on the 21st of June, 1894.

Thereafter, the case was tried on the 29th June, 1895, before Judge Shipman, without a jury, by stipulation, and judgment was rendered in favor of defendant.

The plaintiff thereafter obtained an order from Judge Shipman to reopen the case, and to let in certain material necessary and additional testimony.

The said action is now pending and set down for trial on the 6th day of April, 1896, when said testimony is to be produced before the court.

The testimony of Nanine Palmer, the witness sought to be examined, is material and necessary for the plaintiff at the trial of this action.

Upon information and belief, said Nanine Palmer lives at Chicago, Illinois, at a greater distance from the place of trial than one hundred miles, and her examination *de bene esse* is absolutely necessary for and material to plaintiff's case.

GEORGE AUSTIN MORRISON, JR.

Sworn to before me this 7th day of February, 1896.

LUIS JAMES PHELPS,
Notary Public, City and County of New York.

G. B. Heath, notary public, county of New York.

The President of the United States of America to Mrs. Nanine Palmer, Greeting:

We command you, that all and singular business and excuses being laid aside, you and each of you be and appear in your proper persons before George B. Heath, a notary public appointed by the

governor of the State of New York, in and for county of
281 New York, N. Y., and for the southern district of New York, in the second circuit, at the Coleman house, Broadway and Twenty-seventh street, in the city of New York, in the said southern district of New York, on the tenth day of February, one thousand eight hundred and ninety-six, at three o'clock in the afternoon of the same day, to testify all and singular what you and each of you may know in a certain action now pending undetermined in the said circuit court of the United States for the southern district of New York, wherein August Daly is plaintiff and William A. Brady, the defendant on the part of the plaintiff.

And this you or either of you are not to omit under the penalty upon each and every of you of two hundred and fifty dollars.

Witness, Hon. Melville W. Fuller, Chief Justice of the United States, at the city of New York, the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN A. SHIELDS, *Clerk.*

U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
vs.
WILLIAM A. BRADY, Defendant.

Take notice, that the deposition *de bene esse* of Mrs. Nanine Palmer, a witness, who lives at a greater distance from the place of trial than one hundred miles, to wit, in the city of Chicago, Ill.,
282 will be taken under section 863 of the Revised Statutes of the United States, in accordance with the said statutes in such case provided, and in pursuance of the rules and practice of this court, before George B. Heath, a notary public for the city and county of New York, in the southern district of New York, at the Coleman house, Broadway and Twenty-seventh street, in the city of New York, N. Y., on the tenth day of February, 1896, at three o'clock in the afternoon, said deposition to be read in evidence at the trial of the above-entitled cause on the part of the plaintiff.

This notice is given to you pursuant to an order made in the above-entitled cause and entered on the 7th day of February, 1896, a copy of which order, with notice of entry, is hereby served upon you.

You are requested to attend and cross-examine the witness at this examination and any and all adjournments thereof.

Dated 7th February, 1896.

Yours, &c., OLIN, RIVES & MONTGOMERY,
Plaintiff's Attorneys, 32 Nassau Street, New York City.

To Messrs. Dittenhoefer & Gerber, defendant's attorneys.

(Endorsed :) Copy received Feb. 8th, 1896. Dittenhoefer, Gerber & James.

283 United States Circuit Court, Southern District of New York.

AUGUSTUS DALY
vs.
WILLIAM A. BRADY.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, } ss:

I, George B. Heath, a notary public in and for the county of New York, N. Y., duly appointed by his excellency the governor of the State of New York, with the consent of the senate of said State, and duly commissioned, qualified and authorized to administer oaths and take and certify to examinations of witnesses, testimony and depositions,

Do hereby certify, that pursuant to the annexed subpœna, and the order for subpœna, affidavit and notice of examination, issued and served in the civil cause depending in the circuit court of the United States for the southern district of New York, in which Augustin Daly is plaintiff and William A. Brady is defendant, I was attended at the Coleman house, Broadway and Twenty-seventh street, in the city of New York, N. Y., by Stephen H. Olin, Esq., of counsel for said plaintiff, and by David Gerber, Esq., of counsel for said defendant, on the day, date and time heretofore stated and indicated in said deposition hereto annexed; that the witness Nanine Palmer did on the 10th day of February, 1896, at 3 o'clock in
the afternoon personally appear before me at said Coleman
284 house, said witness being of sound mind and of lawful age.
That said witness was by me first carefully examined, cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth, and she thereupon deposed and testified to the matters contained in the foregoing deposition and as above set forth and shown, and that the deposition made and stated at said examination as above set forth was taken down in my presence and in the presence of said witnesses by my stenographer, by consent, from the statements of said witness, and were then reduced to writing, and the approval and subscription of the said witness Nanine Palmer was waived by counsel for defendant and plaintiff herein. That the said examination was taken at the place in the annexed notice of examination specified and at the time as set forth, and that all was so done, written and signed in the presence of said counsel for plaintiff and defendant.

I further certify that I have subscribed my name to each half sheet thereof and to each exhibit.

I further certify that the reason for taking said deposition was and is that said witness Nanine Palmer lives at a greater distance from the place of trial than one hundred miles, to wit, in the city of Washington, D. C.

The said examination was so taken under the notice of examination and subpœna in writing hereto annexed.

I further certify that I am neither of counsel for nor attorney to either of the parties to said suit, nor interested in the event of said

cause, and that I have retained the said deposition and testimony and the exhibits thereto attached for the purpose of being sealed up by me and directed with my own hand and speedily and safely delivered by me personally to the clerk of the United States circuit court, southern district of New York, the said court for which it was taken, and there to remain under my seal until there opened.

285 I further certify that the fees for taking said examination, testimony and deposition are as follows:

Administering oaths	$0 20
Taking and certifying deposition to file and furnishing copies of depositions	11 00
Total	$11 20

That said fees have been paid to me by the plaintiff, and that the same are just and reasonable for the services performed.

As witness my hand and seal as such notary public, at No. 32 Nassau street, New York city, N. Y., on the 25th day of February, 1896.

GEO. B. HEATH,
Notary Public, N. Y. Co.

(Endorsed:) Opened and filed by order of court this 8th day of April, 1896.

DEFENDANT'S COUNSEL: We move to suppress the deposition and to strike out the evidence upon the same grounds stated when the deposition was offered in evidence and offered to be read; also upon the ground that the evidence is not specific, does not set forth time or place when the alleged offense was committed; does not establish the infringement alleged in the complaint; does not establish the violation or violations covered by the complaint, and that the complaint does not refer to the infringement or infringements referred to by the witness, and that under the complaint only one penalty can be recovered, and that is not set forth in the complaint, nor is the particular infringement sought to be established by the evidence of this witness; that the evidence is too general, incompetent, irrelevant and inadmissible.

Motion denied; to which defendant's counsel then and there duly excepted.

286 Plaintiff's counsel then read in evidence the depositions of Russell Bassett and James J. Corbett, in which both witnesses testified that James J. Corbett was in New Orleans in September, 1892, with the Brady "After Dark" Company, and that said James J. Corbett gave a sparring exhibition during the performance of the play "After Dark"-at one performance in New Orleans in September, 1892.

It is agreed that the testimony of one witness (Westbrook) shall be taken out of court by the plaintiff.

DANIEL P. WESTBROOK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

I have resided at Port Jervis, New York, twenty-two years. I saw the play "After Dark" produced at Port Jervis at "Lee's opera-house," by a company advertised as the Brady Company. The date of that production was March 26, 1892.

(Plaintiff rests.)

Defendant's counsel thereupon moved to dismiss the complaint on the following grounds:

1. That the plaintiff failed to show a valid copyright.
2. Plaintiff failed to show compliance with the statute relating to copyrights.
3. That the title as filed by the plaintiff differed from the title used upon the printed book.
4. That a different title was filed than the one used and adopted in the books printed.

287 5. That there is no proof that notice of the copyright was given as required by law upon each copy of every edition.

6. That there is no proof of infringement.
7. That there is no evidence of knowledge of alleged infringement in the defendant personally.
8. That what is claimed to have been infringed by the defendant is not a dramatic composition or itself subject to protection under the copyright laws.
9. That the mere incident of a rescue, as claimed by the plaintiff, of one character by another, is not in itself the subject of protection under the statute.
10. That it is not a dramatic composition nor in itself a material part of the plaintiff's play.
11. That there is no proof of the number of performances claimed to have been given by the defendant.
12. That the record in the suit in equity wherein the defendant was compelled to be a witness against himself is no evidence of either the number of performances given or to lay the foundation for recovery in an action at law for a penalty, or evidence of any fact found in the said suit in equity.
13. That there is no proof that the defendant played or performed at any time the play or dramatic composition claimed to be copyrighted by the plaintiff.
14. That the mere incident of the plaintiff's play, to wit, the rescue of one character by another, in danger of his life by a passing train, does not render the defendant liable for a penalty under the statute.

288 15. That under the statute a recovery can be had only when the defendant has performed the play claimed to have been copyrighted, or substantially the whole thereof.

16. That there is no evidence of any damage sustained by the plaintiff.
17. That the performances complained of having been given intermediate the decision of Judge Wallace, holding that the plaintiff had no copyright whatever, and the decision of the circuit court of

appeals reversing that ruling, no performances are shown to have been given in violation of the statute or knowingly in violation of plaintiff's rights.

18. That the defendant cannot be held liable for a penalty for any performances that are claimed to have been given after Judge Wallace had judicially determined, in the suit in equity, that the plaintiff had no copyright, and that the defendant and his codefendants in that suit had a right to use not only an incident but the whole of the play, if they saw fit; and that it is not claimed or shown that the defendant gave any performances of the whole or any portion of the plaintiff's play after the decision of the circuit court of appeals.

19. That the plaintiff, having commenced a suit in equity to recover profits, has elected to claim profits and cannot thereafter recover damages or penalty.

20. That the plaintiff had his election, in addition to his remedy and equity, by way of injunction, to have an accounting of the profits made by reason of the alleged improper performances complained of, or to forego the profits and sum for penalty, and having elected in the suit in equity to sue for an accounting, and having proceeded with an accounting, he made his election and cannot thereafter sue for a penalty or damages in this action.

289 21. That the claim of the plaintiff is barred by the statute of limitations, his right of recovery being limited to performances within two years prior to the commencement of the action.

22. That the complaint is not predicated upon a right to recover as for a penalty.

23. That the complaint does not recite the statute by title, section or chapter, or in other similar terms upon which recovery is sought.

24. That the complaint does not show the day, month or year when each alleged violation of plaintiff's rights occurred and each penalty was incurred.

25. That the complaint fails to set forth the time or place when each offense was committed and the penalty incurred.

26. That the complaint does not set forth the times or places where all the offenses were committed or penalties incurred.

27. That the complaint sets forth only one offense, and under the complaint at most, only one penalty can be recovered, there being only one cause of action set forth for the recovery of a penalty.

28. That there is no evidence specifically showing times and places when the alleged offenses were committed, and there is no evidence establishing the violation or violations covered by the complaint.

29. That there is no evidence connecting the defendant with any of the alleged performances given.

30. That there is no evidence that the defendant knew that the performances were being given with any incident infringing or claiming to infringe plaintiff's railroad scene.

290 31. That there is no evidence that the defendant gave or directed the giving of performances with a scene infringing the plaintiff's railroad scene.

Motion denied, to which ruling defendant's counsel then and there duly excepted.

DEFENDANT'S COUNSEL: I make a separate motion that in no event can the court direct judgment against the defendant under this complaint for more than one penalty.

Motion denied, to which defendant's counsel then and there duly excepted.

Thereupon the defendant submitted the following requests to find:

United States Circuit Court for the Southern District of New York, Second Circuit.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY.

The above-named defendant hereby respectfully requests the court to make and find the following, as findings of fact and conclusions of law:

Findings of Fact.

I.

That this action was commenced by the service of the summons upon the 14th day of July, 1893.

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II.

That there has been no proof presented showing the compliance by the plaintiff with the statute relating to copyright.

III.

That the plaintiff failed to comply with the statute relating to copyrights.

IV.

That there has been no proof presented on behalf of the plaintiff that he is the author or proprietor of the dramatic composition referred to in the complaint, or that he filed the title of any such dramatic composition as required by law, or deposited any book or books in the office of the clerk of the district court of the United States in the district where the plaintiff resided in August, 1867.

V.

That the plaintiff is not the owner or proprietor of the dramatic composition referred to in the complaint.

VI.

That the plaintiff failed to file the title of the dramatic composition referred to in the complaint as required by law.

VII.

That plaintiff failed to deposit any book or books in the office of the clerk of the district court of the United States in the district where the plaintiff resided in August, 1867, of the dramatic composition referred to in the complaint.

VIII.

That there has been no proof presented that notice of the copyright was given, as required by law, upon each copy of every edition.

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IX.

That no notice of copyright was given as required by law upon each copy of every edition.

X.

That the title claimed to have been filed by the plaintiff was "Under the Gaslight, a romantic panorama of the streets and homes of New York," which differed materially from the title upon the book or dramatic composition published by the plaintiff, and to which he claims a copyright.

XI.

That there has been no proof of any infringement of the plaintiff's alleged copyright.

XII.

That there was no infringement of the plaintiff's alleged copyright by the defendant.

XIII.

That there is no proof or evidence of any knowledge of infringement by defendant, or any representation given under his direction or authority, which infringed plaintiff's alleged copyrighted book or dramatic composition.

XIV.

That the defendant did not knowingly give or direct the giving of any representation upon the stage which infringed plaintiff's alleged copyrighted book or dramatic composition.

XV.

That no evidence was furnished that any damage was sustained by the plaintiff by reason of any performances claimed to have been given by the defendant.

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XVI.

That there was no damage sustained by the plaintiff by reason of any performance claimed to have been given by the defendant.

XVII.

That the performances claimed to have been given are alleged by the plaintiff to have taken place after it was decided by this court that the plaintiff had no valid copyright in the dramatic composition referred to in the complaint, and during the time the said decision remained unreversed.

XVIII.

That the plaintiff, on or about May 20, 1889, commenced a suit in this court against the defendants William A. Brady, George P. Webster and Henry C. Miner, to restrain the performance and representation of the play "After Dark," so far as the same is claimed by plaintiff to infringe the dramatic composition, "Under the Gas Light," "a romantic panorama of the streets and homes of New York," being the same dramatic composition referred to in the complaint herein. That in and by the bill filed in said equity suit, the plaintiff, among other things, prayed for a judgment and decree that the defendants in said suit, including this defendant William A. Brady, render a full and true account to plaintiff herein, of all the money and profits received from or by reason of the said performances of the said play "After Dark" and of the railroad scene therein.

XIX.

That in said suit, a motion was made by the plaintiff for an injunction, *pendente lite*, to restrain the defendants, including this defendant, from produ-ing the said play "After Dark," or what was known as the "railroad scene" in said play, which motion, after argument, was denied by the Honorable William J. Wallace,
294 circuit judge, on the — day of July, 1889, upon the ground that the plaintiff had no valid copyright in and to said composition.

XX.

That in said suit, issue was joined, and on final hearing, a decree was rendered on the 26th day of October, 1891, dismissing the complaint upon the merits, with costs.

XXI.

That from said decree an appeal was taken by the plaintiff to the circuit court of appeals from the second circuit, where the said decree dismissing the bill of complaint was reversed, with the directions that the usual decree for an accounting and perpetual injunction be entered, with costs to the plaintiff. Thereupon an accounting was taken and had before the master, on which hearing and accounting the defendant, William A. Brady, was by subpœna issued by the master on behalf of the plaintiff, directed to produce books and papers, which were produced in obedience to the subpœna, and the said defendant called and examined as a witness by the plaintiff, and compelled to testify and to produce books and papers, which were introduced in evidence on said accounting against the objection of the defendant.

XXII.

That the report of the master was made, and thereupon a final decree entered on the 1st day of April, 1893.

XXIII.

That all the performances which are claimed to have been given by the defendant in violation of the plaintiff's copyrighted dramatic composition are claimed or asserted so to have been given prior to the decision by the circuit court of appeals on the appeal taken in the said equity suit, and prior to the accounting which was ordered and had in said equity suit.

295 XXIV.

That the plaintiff claims that the defendant violated his alleged copyrighted dramatic composition, by representing upon the stage, in the play "After Dark," the incident of a person in peril of his life, being rescued by another character in the play.

XXV.

That the said incident was not novel or original with the plaintiff.

XXVI.

That the said incident is not a material part of the plaintiff's play.

XXVII.

That the said incident is not a material part of the play "After Dark."

XXVIII.

That the scene of the railway, upon the stage, with a train passing in view of the audience, and a person tied to the track in danger of his life, is not novel or original with the plaintiff.

Conclusions of Law.

I.

That the plaintiff has no valid copyright to the dramatic composition referred to in the complaint.

II.

That the plaintiff failed to comply with the statute relating to copyrights.

III.

That what is claimed to have been infringed by the defendant is not a dramatic composition, nor is it protected under the copyright laws.

296

IV.

That the mere incident of the representation upon the stage of a person in peril of his life from a passing train, being rescued by a third person, is not the subject of protection under the statute.

V.

That the plaintiff having commenced a suit in equity to recover profits, and elected to claim profits, cannot, therefore, recover damages or a penalty.

VI.

That the plaintiff made his election in his suit in equity, by demanding in addition to the injunction, an accounting of the profits derived from the alleged performances, and he cannot sue for a penalty or damages.

VII.

That under the statute which this action is brought being penal, all performances violative of plaintiff's dramatic composition given more than two years prior to the commencement of this action are barred by the statute.

VIII.

That under the statute a penalty can only be recovered where the whole or substantially the whole of the copyrighted dramatic composition was performed.

IX.

That even if the defendant had performed upon the stage the incident of a person in peril of his life from a passing train being rescued by another character in the play, it would not render him liable to the penalty under the statute under which this action is brought.

297

X.

That the record of the final decree and proceeding in the suit in equity brought by the plaintiff against this defendant and others, was no evidence of the plaintiff's title to the dramatic composition or of his compliance with the statute, nor did it establish any right or title to the dramatic composition referred to in the complaint in this action.

XI.

That plaintiff sustained no damage by reason of the alleged performances claimed to have been given by the defendant.

XII.

That the alleged performances claimed by plaintiff to have been given, were given, if at all, after the decision of this court, holding that the plaintiff had no copyright in the said dramatic composi-

tion, and before such decision was reversed, and there were no performances given in violation of the statute, or knowingly in violation of the plaintiff's rights.

XIII.

That no performance was given by the defendant which violated the plaintiff's rights in or to his alleged dramatic composition.

XIV.

That under the complaint in this action, plaintiff cannot recover in any event, more than one penalty.

XV.

That the complaint should be dismissed, with costs to the defendant.

298 The court, on the 14th day of July, 1896, handed down and filed the following additional findings:

Circuit Court of the United States for the Southern District of New York.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY.

In pursuance of an order of this court that the above-entitled cause be opened for the purpose of allowing either party to present additional testimony in regard to the number and times of the representations of "After Dark" by the defendant within two years prior to August 23, 1893, such additional testimony was presented by each party at the April term, 1896, of said court, to wit, on April 9, 1896, before me holding said court and presiding therein, and upon such testimony, the following special findings of fact are hereby made:

Findings of Fact.

Said play of "After Dark" has been publicly produced and represented by the said defendant and his agents in different parts of the United States, without the plaintiff's consent for more than two years before August 23, 1893, and such performances and productions of the said play took place at least one hundred and twenty-six times between August 24, 1891, and October 5, 1892. After said October 5, 1892, a change was made by the defendant in the representation of the railroad scene, whereby the infringement ceased.

299 The evidence as to these performances and all performances subsequent to August 24, 1891, is entirely independent of the evidence obtained from the defendant by the plaintiff's examination of him in the accounting before the master in the equity suit

mentioned in the prior findings of fact. No pleading or evidence of the defendant has been used or taken in evidence in ascertaining any facts as to performances or for the enforcement of any alleged liability in this case.

All the conclusions of law heretofore stated, except the ninth, remain unchanged. The words in the ninth finding, after the figures "$7,800" are erased, and in lieu of them the following are substituted. Upon the new and adequate testimony before the court, the plaintiff is entitled to judgment against the defendant of $50 for each performance falling within the period of two years prior to the commencement of this action, that is to say, for 126 performances, the sum of $6,300, with costs. One count brought under section 4966 can, for the sake of brevity and convenience, include the averments of a series or a number of performances, and can properly claim damage therefor (Stephens' Pleading, 268; Longworth *v.* Knapp, 4 Abb. Pr., 116).

The testimony for the plaintiff, except that of one witness, was taken by depositions.

Divers objections were taken to the whole of each deposition, and each was asked to be excluded. The depositions of Palmer, Kingsbury and Hayes were taken, because each resided more than one hundred miles from the place of trial, and the magistrate certifies to the truth of this averment. The deposition of Meredith was taken in Philadelphia, where he was temporarily, the reason given in the certificate being that he was going out of the southern district of New York, and more than one hundred miles from the place of trial. He was at that time going from Philadelphia to Pittsburg.

His deposition showed that he lived in Boston, and more
300 than one hundred miles from the place of trial, and did not live in the southern district of New York, and upon the trial it appeared that that was the reason for taking the deposition. These depositions were admitted without calling upon the plaintiff to prove that the witnesses still resided one hundred miles from the place of trial, in accordance with the rule as announced in Whitford *v.* Clark Co., 119 U. S., 522, "When a witness, whose deposition is taken *de bene esse*, under the Revised Statutes, sec. 863, lives more than one hundred miles from the place of trial when the deposition is taken, it will be presumed that he continues to live there at the time of trial, and no further proof on that subject need be offered by the party offering the deposition, unless this presumption is overcome by proof upon the other side." The defendant offered no proof upon the subject. The immediate reduction to writing of the stenographer's minutes and the signature of the witnesses to such written deposition were waived by the defendant. The depositions of Westbrook, Corbett, Bassett, McIntyre, Heath and McConnell were taken by stipulation on the part of the defendant and not in pursuance of section 863. Instead of subjecting the witnesses to the trouble and delay of an examination in court or elsewhere, the defendant stipulated to produce them for examination and that their depositions might be taken in the city of New York. That defendant objected to the testimony of Kingsbury in

regard to the receipts *of* St. Paul from the performances of "After Dark" in January, 1892, and his statement, so far as it was obtained from the statement book kept by Mr. Bixby, is excluded. The testimony itself is unimportant, and is not material in value. The four exhibits from newspapers, offered in connection with the testimony of Westbrook were objected to and are excluded. The programme offered in connection with the testimony of Corbett was objected to and is excluded. The whole testimony of Corbett, Bassett, Heath and McConnell was of no value, except the fact contained in the testimony of Bassett and Corbett that the latter
301 was in New Orleans in September, 1892, with the Brady "After Dark" Company.

The deposition of Robinson was not offered by the plaintiff.

The programme offered in connection with Kingsbury's testimony was admitted, because he identifies the programme as the one actually used in 1892 at the opera-house in St. Paul.

The testimony of Meredith, "He told me something about having a contract that he was to play it there" (in Brooklyn), was stricken out upon motion of the defendant.

The rosters or route lists which were shown to witnesses by the plaintiff, to refresh their recollection, and were filed for identification, or were attached to depositions, were not regarded.

The following question to Nanine Palmer: "Do you remember seeing Corbett in New Orleans?" and the question to Kingsbury: "Do you remember a play being performed?" &c., were objected to as leading, and were excluded. The other objections which were taken by the defendant and which have not been hereinbefore referred to, to the depositions offered by the plaintiff, or to any question or answer thereto were overruled.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) Circuit court U. S., south. dist. N. Y. Augustin Daly *vs.* William A. Brady. Additional findings of fact and conclusions of law. Shipman, J. U. S. circuit court. Filed Jul- 14, 1896. John A. Shields, clerk.

302 Defendant thereupon filed the following exceptions:

United States Circuit Court, Southern District of New York.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY.

The defendant hereby excepts to the decision and findings of the court filed herein on the 24th day of June, 1895, as follows:

I.

He excepts to the first finding of fact made and found by the court.

II.

He excepts to the second finding of fact made and found by the court.

III.

He excepts to the third finding of fact made and found by the court.

IV.

He excepts to the fourth finding of fact made and found by the court.

V.

He excepts to the fifth finding of fact made and found by the court.

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VI.

He excepts to the sixth finding of fact made and found by the court.

VII.

He excepts to the seventh finding of fact made and found by the court.

VIII.

He excepts to the eighth finding of fact made and found by the court.

IX.

He excepts to the ninth finding of fact made and found by the court.

X.

He excepts to the tenth finding of fact made and found by the court.

XI.

He excepts to the twelfth finding of fact made and found by the court.

XII.

He excepts to so much of the thirteenth finding of fact as finds that the play "After Dark" has been publicly produced and represented by the defendant, and his agent, in different parts of the United States, without the consent of the plaintiff, and that such performance and production of the said play took place seven hundred and forty-seven times between June 19, 1889, and October 4, 1892, and that of said performances one hundred and fifty-six took place in or after August, 1891, and within two years after the commencement of this action, stated and found in said thirteenth finding of fact.

XIII.

He excepts to the fourteenth finding of fact made and found by the court.

304 XIV.

He excepts to the fifteenth finding of fact made and found by the court.

XV.

He excepts to the first conclusion of law made and found by the court in and by the said decision filed as aforesaid on the 24th day of January, 1895.

XVI.

He excepts to the second conclusion of law made and found by the court.

XVII.

He excepts to the eighth conclusion of law made and found herein.

XVIII.

He excepts to the ninth conclusion of law made and found by the court, so far as the court therein concludes or finds that if the master's report, referred to in the said decision, or evidence upon which it was based had been admissible, the plaintiff would have been entitled to a judgment against the defendant for the sum of fifty dollars for each performance falling within the period of two years prior to the commencement of this action.

XIX.

The defendant hereby also excepts to the decision and finding of the court made and filed on the 14th day of July, 1896.

XX.

He excepts to so much of the finding of fact and said decision of the court, wherein the court finds that the play "After Dark" has been produced and represented by the defendant and his agents in different parts of the United States without the plaintiff's
305 consent for more than two years before August 23, 1893, and that such performances and productions of the said play took place at least one hundred and twenty-six times between August 24, 1891, and October 5, 1892.

XXI.

He excepts to the conclusion of law arrived at and found by the court in and by said decision.

XXII.

He excepts to so much of the conclusion of law arrived at and made by the court in and by the said decision and findings of July 14, 1896, wherein and whereby the court concludes and finds that the *defendant* is entitled to judgment against the defendant in the sum of fifty dollars for each performance falling within the period of two years prior to the commencement of this action, that is, for one hundred and twenty-six performances, the sum of sixty-three hundred dollars.

XXIII.

Defendant also hereby excepts to the refusal of the court to make and find the findings of fact and conclusions of law requested by the defendant.

XXIV.

He excepts to the refusal of the court to make and find the second finding of fact requested by the defendant.

XXV.

He excepts to the refusal of the court to make and find the third finding of fact requested by the defendant.

XXVI.

He excepts to the refusal of the court to make and find the fifth finding of fact requested by the defendant.

XXVII.

He excepts to the refusal of the court to make and find the seventh finding of fact requested by the defendant.

XXVIII.

He excepts to the refusal of the court to make and find the eighth finding of fact requested by the defendant.

XXIX.

He excepts to the refusal of the court to make and find the ninth finding of fact requested by the defendant.

XXX.

He excepts to the refusal of the court to make and find the tenth finding of fact requested by the defendant.

XXXI.

He excepts to the refusal of the court to make and find the eleventh finding of fact requested by the defendant.

XXXII.

He excepts to the refusal of the court to make and find the twelfth finding of fact requested by the defendant.

XXXIII.

He excepts to the refusal of the court to make and find the thirteenth finding of fact requested by the defendant.

XXXIV.

He excepts to the refusal of the court to make and find the fourteenth finding of fact requested by the defendant.

XXXV.

He excepts to the refusal of the court to make and find the fifteenth finding of fact requested by the defendant.

307 XXXVI.

He excepts to the refusal of the court to make and find the sixteenth finding of fact requested by the defendant.

XXXVII.

He excepts to the refusal of the court to make and find the seventeenth finding of fact requested by the defendant.

XXXVIII.

He excepts to the refusal of the court to make and find the twenty-third finding of fact requested by the defendant.

XXXIX.

He excepts to the refusal of the court to make and find the twenty-fourth finding of fact requested by the defendant.

XL.

He excepts to the refusal of the court to make and find the twenty-fifth finding of fact requested by the defendant.

XLI.

He excepts to the refusal of the court to make and find the twenty-sixth finding of fact requested by the defendant.

XLII.

He excepts to the refusal of the court to make and find the twenty-seventh finding of fact requested by the defendant.

XLIII.

He excepts to the refusal of the court to make and find the twenty-eighth finding of fact requested by the defendant.

308 XLIV.

He excepts to the refusal of the court to make and find the first conclusion of law.

XLV.

He excepts to the refusal of the court to make and find the second conclusion of law requested by the defendant.

XLVI.

He excepts to the refusal of the court to make and find the third conclusion of law requested by the defendant.

XLVII.

He excepts to the refusal of the court to make and find the fourth conclusion of law requested by the defendant.

XLVIII.

He excepts to the refusal of the court to make and find the fifth conclusion of law requested by the defendant.

XLIX.

He excepts to the refusal of the court to make and find the sixth conclusion of law requested by the defendant.

L.

He excepts to the refusal of the court to make and find the eighth conclusion of law requested by the defendant.

LI.

He excepts to the refusal of the court to make and find the ninth conclusion of law requested by the defendant.

LII.

He excepts to the refusal of the court to make and find the tenth conclusion of law requested by the defendant.

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LIII.

He excepts to the refusal of the court to make and find the eleventh conclusion of law requested by the defendant.

LIV.

He excepts to the refusal of the court to make and find the twelfth conclusion of law as requested by the defendant.

LV.

He excepts to the refusal of the court to make and find the thirteenth conclusion of law requested by the defendant.

LVI.

He excepts to the refusal of the court to make and find the fourteenth conclusion of law requested by the defendant.

LVII.

He excepts to the refusal of the court to make and find the fifteenth conclusion of law requested by the defendant.

The foregoing bill of exceptions contains the evidence taken upon the trial of this action, which was material upon the exceptions

presented and set forth in the foregoing bill of exceptions, and because the evidence, exceptions and other matters and things hereinabove set forth do not appear in the record of said cause, and in order that they may appear, the attorneys for the defendant William A. Brady have prepared and caused this bill of exceptions, upon due notice to the attorneys for the plaintiff Augustin Daly, to be settled as the record thereof, according to the form and practice followed and prescribed by this court, and have caused the
310 same to be signed and filed, and the same are hereby settled and allowed as a true and correct bill of exceptions in this cause.

Witness my hand this 24th day of August, 1896, in term time.

N. SHIPMAN,
Judge U. S. Circuit Court for the Second Circuit.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Defendant.

United States Circuit Court of Appeals for the Second Circuit.

WILLIAM A. BRADY, Plaintiff in Error,
against
AUGUSTIN DALY, Defendant in Error.

Assignment of Errors.

And now, at the October term of the above-named court for the year 1895, comes William A. Brady, plaintiff in error, by Dittenhoefer, Gerber and James, his attorneys, and says that in the record and proceedings in the above-entitled cause, there is manifest error, and makes and files the following assignments of error:

I.

During the trial the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, the record in an action in equity, brought by the defendant in error,
311 Augustin Daly, against George P. Webster, William A. Brady and Henry C. Miner, for an injunction and an accounting of the profits. The full substance of the evidence admitted is, that on or about July 14, 1893, the plaintiff, Augustin Daly, commenced a suit in equity in the United States circuit court for the southern district of New York, against George P. Webster, William A. Brady and Henry C. Miner, to enjoin the defendants in said suit from performing what was termed the "railroad scene," or incident in the play "After Dark," and for an accounting from the defendants in said suit of all money and profits received from or by reason of the said performances of the play "After Dark," and of the railroad scene therein, and other relief, in which suit judgment was rendered dismissing the complaint on its merits, with costs; from which judgment the complainant in said suit, Augustin Daly, appealed to the circuit court of appeals for the southern district of New York, which

court reversed the judgment of the court below and instructed the United States circuit court for the southern district of New York to enter the usual decree for account and perpetual injunction with costs to the complainant, Augustin Daly, against the said defendants, and accordingly a decree was entered in the circuit court, enjoining said George P. Webster and William A. Brady from using and producing the "railway scene or incident" as copyrighted in the dramatic composition entitled "Under the Gas Light," and referring it to a master to ascertain and report to the court an account of the number of times said "railway scene" was used by the defendants without the sanction and authority of the said complainant, and where each and every such authorized performance and production took place, and directing, adjudging and decreeing that the complainant on such accounting should have the right to cause an examination of the said defendants and each of them, their agents or servants *ore tenus* or otherwise, and also the pro-
312 duction of all books, vouchers and documents of said defendants, their agents or servants; and that the said defendants, their agents or servants, attend for such purpose before the aforesaid master from time to time as said master shall direct, and in accordance with which decree proceedings were had before the master named in the said decree, who made a report which was confirmed and a final judgment was entered on the said report confirming the report of the said master, and finding that the said railroad scene was used and produced by the defendant at the times and places specified in the said master's report.

The court, at the trial, admitted the said evidence and record, although the master's report was founded mainly upon evidence exacted from the defendant in the said suit, William A. Brady (the plaintiff in error), given under compulsion, and when called as a witness for the complainant in said suit, Augustin Daly, and from books and papers produced by plaintiff in error by virtue of the subpœna issued by the said master and served upon said plaintiff in error, William A. Brady.

II.

That the court erred in admitting the said record in evidence over the objection and exception of the plaintiff in error, and holding that the same was evidence of the title of the defendant in error to the play referred to in the complaint and the alleged copyright thereof, and the infringement of the rights of the defendant in and to said play and the copyright thereof by the plaintiff in error.

That the decree in the said suit was founded upon the answer interposed by the defendants in the said suit, including William A. Brady, plaintiff in error, which answers and the answer of the said William A. Brady was under oath, the complainant Augustin Daly not having waived the oath to the answer, and the said decree was founded upon evidence produced in the said suit in equity by the complainant therein, Augustin Daly, and the
313 defendants George P. Webster and William A. Brady, taken before the standing examiners of the court.

III.

That the court erred in admitting, over the objection and exception of the plaintiff in error, the said record, and in holding that the said record was *res adjudicata*, and excluding evidence, offered by the plaintiff in error, showing or tending to show that the plaintiff did not originate or compose the play referred to the bill of complaint, or the incident designated the railroad scene.

IV.

That the court erred in excluding the evidence offered by the plaintiff in error of the publication or story entitled "Captain Tom's Fright," published prior to the writing of the play claimed by the defendant in error. That the substance of the evidence rejected is that the story "Captain Tom's Fright," was published in an illustrated magazine entitled *The Galaxy*, in 1867, prior to the writing by the defendant in error of the play claimed to have been copyrighted by him, and prior to the filing of the title or the deposit of any books by the defendant in error, Augustin Daly, of his said alleged copyrighted play referred in the complaint, in which said story "Captain Tom's Fright," so published, there appeared and was described the incident or scene of a railroad with a person, or character bound to the track, in danger of death from an approaching train, the life of the said character so bound to the track being saved by reason of the fact described in the said story, that the train passed on a side track or cut-off within a foot of the head of the character so bound to the track, who had been bound on the straight track while the train passed on the cut-off.

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V.

That the court erred in excluding the evidence offered by the plaintiff in error of the publication or story entitled "London by Night," published prior to the writing of the play claimed by the defendant in error.

The said publication "London by Night" is a drama in two acts, claimed by the defendant in error to have been first published and produced at the Strand threatre, January 11, 1844, and in which play in the third scene of the second act one of the characters is placed senseless upon a railroad track with the intent of having him, presumably, killed by the passing train, and he is rescued by another character by removing him from the track just as the train passes across the stage.

VI.

That the court erred in excluding the evidence offered by the plaintiff in error of the publication or story entitled "Railroad Station," published prior to the writing of the play claimed by the defendant in error.

The said publication "Railroad Station" is a play in one act, claimed by the plaintiff in error to have been published and first

produced at the Royal Olympic theatre, October 3, 1840, in which play and publication there was the incident of a railroad station and a train of cars passing in view of the audience.

VII.

That the court erred in excluding the evidence offered by the plaintiff in error of the publication or story entitled "Scamps of London," published prior to the writing of the play claimed by the defendant in error.

The said publication or story "Scamps of London" is a play claimed by the plaintiff in error to have been first performed and published in the Theatre Royal, Sadlers Wells, on November 13, 1843, in which act "third" contains the incident of a railroad track, across which one of the characters is laid in danger of her life from a passing train, and who is rescued by another character as the train dashes across the stage.

315

VIII.

That the court erred in making the order bearing date November 15, 1895, wherein and whereby, after the court had dismissed the complaint upon the merits, made and filed its decision and findings of fact and conclusions of law, it ordered that a new trial be granted for the purpose of allowing either party to present additional testimony in regard to the number of times of the representations, if any there were, of the play "After Dark" by the defendant within two years prior to the commencement of this action.

IX.

That the court erred in refusing to grant the plaintiff in error a right to a trial by jury after a motion for a new trial had been made by the defendant in error, and the order granted bearing date November 15, 1895.

X.

That the court erred in overruling and denying the request of the plaintiff in error for a trial by a jury, made when this case was moved for trial after the granting of the application of the defendant in error for a new trial.

XI.

That the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, the deposition of Harry Meredith, whereas the said deposition should have been suppressed and the evidence excluded.

316

XII.

That the court erred in admitting, over the objection and exception of the plaintiff in error, the answers of the witness Harry Meredith to the interrogatories propounded to him, although the inter-

rogatories or questions were too general, incompetent, immaterial and irrelevant, and the evidence not directed to any alleged infringement referred to in the complaint, or any specific times when and places where the alleged infringement occurred.

XIII.

That the court erred in admitting, over the objection and exception of the plaintiff in error, evidence of the witness Harry Meredith of the alleged performance of the play "After Dark," which he stated were given subsequent to September 7, 1891, although the witness was unable to state the times when or the places where the said performances were given after said September 7, 1891.

XIV.

That the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, the deposition of George A. Kingsbury, whereas the said deposition should have been suppressed and the evidence excluded.

XV.

That the court erred in admitting, over the objection and exception of the plaintiff in error, the answers of the witness George A. Kingsbury to the interrogatories propounded to him, although the interrogatories or questions were too general, incompetent, immaterial and irrelevant, and the evidence not directed to any alleged infringement referred to in the complaint, or any specific times when and places where the alleged infringement occurred.

317 XVI.

That the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, the answers of the witness George Kingsbury to interrogatories propounded to him, the said Kingsbury having testified that he saw two or three performances of "After Dark," but that his knowledge of the date when he saw the play was derived entirely from notations in a book kept by one Mr. Bixby and not in the handwriting of the witness, and the witness testified that he had no personal knowledge of the date when Mr. Bixby made the entries in said book, the said testimony of the said witness Kingsbury as to the dates when he claims to have seen the performances of the play "After Dark" being entirely hearsay and based upon a statement contained in a book kept by another party, the accuracy of which the witness had no personal knowledge.

XVII.

That the court erred in admitting in evidence, over the objection and exception of the plaintiff in error, the deposition of Theodore L. Hayes, whereas the said deposition should have been suppressed and the evidence excluded.

XVIII.

That the court erred in admitting, over the objection and exception of the plaintiff in error, the answers of the witness Theodore L. Hayes to the interrogatories propounded to him, although the interrogatories or questions were too general, incompetent, immaterial and irrelevant, and the evidence not directed to any alleged infringement referred to in the complaint, or any specific times when and places where the alleged infringement occurred.

318

XIX.

That the court erred in admitting in evidence, over the objection of the plaintiff in error, the deposition of Nanine Palmer, whereas the said deposition should have been suppressed and the evidence excluded.

XX.

That the court erred in admitting, over the objection and exception of the plaintiff in error, answers of the witness Nanine Palmer to the interrogatories propounded to her, although the interrogatories or questions were too general, incompetent, immaterial and irrelevant, and the evidence not directed to any alleged infringement referred to in the complaint, or any specific times when and places where the alleged infringement occurred.

XXI.

That the court erred in refusing to dismiss the complaint as requested at the trial by the plaintiff in error.

XXII.

That the court erred in denying the motion made by the plaintiff in error, that the complaint be dismissed.

XXIII.

That the court erred in holding and adjudging that the plaintiff invented, composed and was the author of the dramatic composition referred to in the complaint.

XXIV.

That the court erred in holding and determining that the defendant in error possessed the sole and exclusive right to print and publish the said book or dramatic composition referred to in the complaint and the sole right to represent the same upon the stage and to have complied with the provisions of the act of Congress in such case made and provided.

319

XXV.

That the court erred in holding and deciding that the plaintiff deposited a printed copy of the title of the said play and thereafter deposited the book of the said play with the clerk of the district

court and in the Library of Congress at Washington, and that he gave information of the copyright of the several copies of each book.

XXVI.

That the court erred in holding and deciding that the alleged play of the defendant in error was successful and profitable, and that the cause of the success was the scene or incident at the end of the third scene of the fourth act called the railroad scene or sensation.

XXVII.

That the court erred in holding and deciding that the copyright of the dramatic composition claimed by the defendant in error is good and valid.

XXVIII.

That the court erred in holding and deciding that the plaintiff in error gave one hundred and twenty-six performances of the play "After Dark" within two years prior to the commencement of this action.

XXIX.

That the court erred in holding and deciding that the plaintiff in error was liable under section 4966 of the United States Revised Statutes in giving a performance of the play "After Dark," although the said play is not the play referred to in the bill of complaint or a simulation, adaptation or modification thereof.

XXX.

That the court erred in holding and deciding that the performance upon the stage of the incident of a rescue by a third party of a person in danger of his life from a passing train in the
320 play "After Dark" brings such performance within the condemnation of section 4966 of the United States Revised Statutes, although in every other respect the performance of the play is dissimilar from the play referred to in the bill of complaint.

XXXI.

That the court erred in holding and deciding that the suit in equity and the proceeding by the defendant in error instituted against the plaintiff in error prior to the commencement of this action, for an accounting of the gains and profits made by the plaintiff in error from the performance claimed to have been given by him of the play "After Dark," referred to in the complaint in this action, was not an election and did not preclude the defendant in error from proceeding thereafter for the recovery of a penalty for the giving of the same performances referred to in the said suit in equity.

XXXII.

That the court erred in holding and deciding that under the complaint in this action, the defendant in error could recover more than one penalty under section 4966 of the United States Revised Statutes.

XXXIII.

That the court erred during the trial in refusing to compel the defendant in error to elect whether he seeks to recover on his complaint for penalties or damages, and in overruling the motion made by the plaintiff in error to compel the defendant in error so to elect.

XXXIV.

That the court erred in refusing to dismiss the complaint and in adjudging and decreeing that Augustin Daly, the defendant in error, do recover of William A. Brady, the plaintiff in error, the sum of sixty-three hundred dollars and the further sum of
321 three hundred and forty-five and $\frac{12}{100}$ — costs, amounting in all to the sum of six thousand six hundred and fifty-five and $\frac{12}{100}$ dollars, whereas the court should have dismissed the complaint.

Wherefore, the said William A. Brady, the plaintiff in error, prays that the judgment of the said circuit court for the southern district of New York be reversed and the said circuit court be ordered to enter an order granting a new trial to the plaintiff in error in the above-entitled action.

DITTENHOEFER, GERBER & JAMES,
Att'ys for Pl'ff in Error, William A. Brady.

(Endorsed:) U. S. circuit court of appeals. William A. Brady *vs.* Augustin Daly. Assignment of errors. Dittenhoefer, Gerber & James, attorneys for plaintiff, 96 Broadway, New York. U. S. circuit court. Filed Sep. 23, 1896. John A. Shields, clerk.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

AUGUSTIN DALY
vs.
WILLIAM A. BRADY. } Bond for Costs.

Know all men by these presents that we, William A. Brady, of No. 150 West One Hundred and Twenty-third street, in the city of New York, and Marie R. Brady, residing at No. 150 West One
322 Hundred and Twenty-third street, in the city of New York, are held and firmly bound unto the above-named Augustin Daly, in the sum of two hundred and fifty dollars, to be paid to the said Augustin Daly, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 21st day of September, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, the above-named William A. Brady, has prosecuted a writ of error to the United States circuit court of appeals, for the second circuit, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States, for the southern district of New York, and entered on the 17th day of September, 1896:

Now, therefore, the condition of this obligation is such, that if the above-named William A. Brady, shall prosecute his writ of error to effect and answer all costs, if he should fail to make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WM. A. BRADY. [SEAL.]
MARIE R. BRADY. [SEAL.]

Sealed and delivered, and taken and acknowledged this 21st day of September, 1896, before me.

H. G. WILEY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Marie R. Brady, being duly sworn, doth depose and say
323 that she is worth the sum of five hundred dollars over and above all her just debts and liabilities.

MARIE R. BRADY.

Sworn to this 21st day of September, A. D. 1896, before me.

H. G. WILEY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) U. S. circuit court, southern district of New York. Augustin Daly *vs.* William A. Brady. Bond for costs on writ of error. Dittenhoefer, Gerber & James, att'ys for def't, 96 Broadway, N. Y. Approved Sept. 23, 1896. E. Henry Lacomb-, U. S. circuit judge. U. S. circuit court. Filed Sep. 23, 1896. John A. Shields, clerk.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

AUGUSTIN DALY *vs.* WILLIAM A. BRADY. } Bond for Costs.

Know all men by these presents, that we William A. Brady and Marie R. Brady and John Farrell are held and firmly bound unto the above-named Augustin Daly in the sum of five hundred
324 dollars, to be paid to the said Augustin Daly, for the payment of which well and truly to be made, we bind ourselves and

each of us, our and each of our heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 3rd day of October in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, the above-named William A. Brady has prosecuted a writ of error to the United States circuit court of appeals for the second circuit to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York, and entered on the 17th day of September, 1896:

Now, therefore, the condition of this obligation is such, that if the above-named William A. Brady shall prosecute his writ of error to effect and answer all costs, if he should fail to make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WM. A. BRADY. [SEAL.]
MARIE R. BRADY. [SEAL.]
JOHN FARRELL. [SEAL.]

Sealed and delivered and taken and acknowledged this 3d day of October, 1896, before me.

MORGAN D. McMONEGAL,
[SEAL.] *Notary Public* (26), *N. Y. Co.*

UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

Marie R. Brady, being duly sworn, doth depose and say: that she is worth the sum of ten hundred dollars over and above all her just debts and liabilities.

MARIE R. BRADY.

Sworn to this 3d day of October, A. D. 1896, before me.

MORGAN D. McMONEGAL,
[SEAL.] *Notary Public* (26), *N. Y. Co.*

325 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

John Farrell, being duly sworn, doth depose and say: that he is worth the sum of ten hundred dollars over and above all his just debts and liabilities.

JOHN FARRELL.

Sworn to before me this 10th day of October, 1896.

R. M. BINGHAM,
[SEAL.] *Notary Public* (178), *New York County.*

(Endorsed:) U. S. circuit court, southern district of New York. Augustin Daly *vs.* William A. Brady. Bond for costs on writ of error. Dittenhoefer, Gerber & James, att'ys for def't, 96 Broadway, N. Y. Approved Oct. 12, 1896. E. Henry Lacombe, U. S. circuit

judge. U. S. circuit court. Filed Oct. 12, 1896. John A. Shields' clerk.

326 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM A. BRADY, Defendant Below, Plaintiff in Error,
against
AUGUSTIN DALY, Plaintiff Below, Defendant in Error.

The petition of William A. Brady, the defendant in the above action, and the plaintiff in error, respectfully shows as follows:

First. That the said action was commenced on the 14th day of July, 1893, by the service of the summons, and was brought to recover the sum of thirty-seven thousand dollars ($37,000), claimed by the plaintiff (defendant in error). That the said plaintiff was the author of a play entitled "Under the Gaslight," a romantic panorama of the streets and homes of New York, which play or dramatic composition said plaintiff claimed to have copyrighted under and pursuant to the statutes of the United States in such cases made and provided, and in which play or dramatic composition there was a scene or incident termed a "railroad scene," in which a character placed or tied across a railroad track in danger of his life from a passing train is rescued by a third person; and the said plaintiff claimed that the defendant performed a play entitled "After Dark," in the course of the performance of which play there was a scene or incident of a railroad and a rescue of a
327 character in danger of his life from a passing train, which rescue it is claimed, was a violation and infringement of the rights claimed by the plaintiff.

Second. That the complaint was served August 23, 1893, and issue was joined by the service of the defendant's answer, December 29, 1893, and the filing of the application of the plaintiff, June 14, 1894. That the issues in the action were brought to trial on the 29th day of May, 1895, before Honorable Nathaniel J. Shipman, circuit judge, and the parties having stipulated in writing and filing with the clerk before the trial of said action, that the issues of fact therein should be tried and determined by the court without the intervention of a jury, under sections 649 and 700 of the Revised Statutes of the United States, said issues were duly tried before the said circuit court, and the court did on the 24th day of June, 1895, hand down and file with the clerk of the United States circuit court for the southern district of New York, special findings, wherein and whereby among other things the court directed and decided that the complaint of the plaintiff be dismissed on the merits, with costs; and thereafter and on the 21st day of October, 1895, the said plaintiff made a motion for a new trial before the said judge, who on the 15th day of November, 1895, made and filed an order with the clerk of said circuit court, granting the motion for the new trial, to the extent that the cause be opened for the purpose of allowing either party to present additional testimony in regard to the numbers and time of the performances, if any there were, of the play "After

Dark" by the defendant within two years prior to the commencement of this suit, and for the production of such testimony, this case was set down to be heard, and was subsequently heard, on the 9th day of April, 1896, and the court (said judge presiding) did on the 4th day of July, 1896, hand down and file additional
328 special findings, among other things finding and deciding that the plaintiff was entitled to judgment against the defendant for the sum of sixty-three hundred ($6,300) dollars, with costs; to which decision and findings the defendant (plaintiff in error) duly filed exceptions with the clerk of the said circuit court, on the 3d day of August, 1896, and thereafter and on the 17th day of September, 1896, judgment was duly entered in this action adjudging that the plaintiff recover of the defendant (plaintiff in error) the sum of sixty-three hundred dollars, together with costs and disbursements amounting to three hundred and forty-five and $\frac{13}{100}$ dollars, and that the plaintiff have execution therefor.

Third. This defendant is advised and believes that there are manifest errors in said findings, order granting new trial and judgment, in that among other things it was found that said plaintiff was entitled to recover the sum mentioned in the said judgment from the said defendant, and in other respects particularly pointed out by the defendant's exceptions.

That this defendant feeling aggrieved by the said findings, order and judgment, prays that a writ of error may be issued by the United States circuit court of appeals to the United States circuit court for the southern district of New York, requiring the judges of said last-mentioned court to send the record and proceedings in this action to the judges and justices of the United States court of appeals for the second circuit in the post-office building in city of New York, at a time therein mentioned, and for such other and further relief as to the court may seem best.

And your petitioner will ever pray, &c.

DITTENHOEFER, GERBER & JAMES,
Att'ys for Petitioner and Plaintiff in Error,
Wm. A. Brady, 96 Broadway, N. Y. City.

329 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

William A. Brady, being duly sworn, says: That he is the defendant in this action and the plaintiff in error; that he knows the contents of the foregoing petition, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WM. A. BRADY.

Sworn to before me this 21st day of September, 1896.

H. G. WILEY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) United States circuit court of appeals for the second circuit. William A. Brady, defendant below, plaintiff in error, *vs.* Augustin Daly, plaintiff below, defendant in error. Petition for writ of error. Dittenhoefer, Gerber & James, attorneys for plaintiff in error, 96 Broadway, New York. U. S. circuit court. Filed Sep. 23, 1896. John A. Shields, clerk.

330 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM A. BRADY, Plaintiff in Error,
against
AUGUSTIN DALY, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the 25th day of September, 1896, in said term, the said Augustin Daly, defendant in error, by Olin, Rives & Montgomery, his attorneys, comes here into court and says that there is no error either in the record or in the proceedings aforesaid, or in the giving of the judgment and decree aforesaid.

And the said defendant in error prays that the said United States circuit court of appeals for the second circuit before the judges thereof now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment and decree aforesaid, in form aforesaid given, may be in all things affirmed, &c.

OLIN, RIVES & MONTGOMERY,
Attorneys for Augustin Daly, Defendant in Error.

STEPHEN H. OLIN, *Of Counsel.*

(Endorsed:) United States circuit court of appeals for the second circuit. William A. Brady, pl'ff in error, ag'st Augustin Daly, def't in error. Joinder in error. Olin, Rives & Montgomery, attorneys for def't in error, 32 Nassau street, New York city. U. S. circuit court. Filed Sep. 25, 1896. John A. Shields, clerk.

331 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Augustin Daily, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of appeals of the United States, to be holden at the city of New York on the 19th day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William A. Brady is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 23d day of September, in the year of our Lord one thousand eight hundred and ninety-six.

E. HENRY LACOMBE,
Judge of the United States Circuit Court of Appeals for Second Circuit.

(Endorsed:) U. S. circuit court of appeals. William A. Brady, plaintiff in error, *vs.* Augustin Daly, defendant in error. Citation. Dittenhoefer, Gerber & James, attorneys for plaintiff in error, 96 Broadway, New York. Received a copy of this paper on Sept. 24, 1896. Olin, Rives & Montgomery, attorneys for plaintiff. U. S. circuit court. Filed Sep. 25, 1896. John A. Shields, clerk.

332 At a special term of the United States circuit court held in and for the southern district of New York, at the United States court-house, in the city of New York, post-office building, on the 15th day of April, 1897.

Present: Hon. Nathaniel Shipman, United States circuit judge.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

On reading and filing the affidavit of Stephen H. Olin, verified the sixth day of April, 1897, and the stipulation and consent of Messrs. Dittenhoefer, Gerber & James, attorneys for plaintiff in error, to the entry of the within order, it is, on motion of Messrs. Olin & Rives, attorneys for defendant in error,

Ordered, that the bill of exceptions on appeal to the United States circuit court of appeals for the second circuit, as settled and filed herein on the 25th day of August, 1896, be and the same hereby is amended as follows, viz: by adding at page 40, line 25, the verification to answer as follows:

I. "UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

George P. Webster and William A. Brady, being duly and severally sworn, deposes and says, that he is one of the defendants herein; and each for himself says that he has read the fore-
333 going answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEO. P. WEBSTER.
WM. A. BRADY.

Sworn to before — this 31st day of May, 1889.

WM. C. FOLEY,
[SEAL.] *Notary Public, Kings County.*

Cert. filed in N. Y. Co."

II. By striking out, at page 44, line 17, the words, "the plaintiff then offered testimony to show the plaintiff's actual damages from the alleged infringement (plaintiff rested)," and inserting in their place the following:

"AUGUSTIN DALY, being called as a witness in behalf of plaintiff and duly sworn, testified as follows:

Direct examination:

I am the complainant in this action and reside in the city of New York. I am a theatrical manager and dramatic author, and was the complainant in a former action in the circuit court of the United States for the southern district of New York, in which George P. Webster and William A. Brady were defendants. The play "Under the Gaslight" has been often produced by myself and others under my license, and has been a considerable source of income to me. The last payment I received was within a month.

I have made a practice of licensing the production of the play when suitable offers were made.

The paper shown me is an agreement that I had with Mr. Turner

Paper offered and marked Plaintiff's Exhibit No. 1 for identification.

334 The chief source of the value of this play has been at all times what was generally called the railroad scene in the play. The rest of the play at the present time has not much more value than the old dramas of twenty-five or thirty or forty years ago.

What is called the railroad scene is the source of the commercial value, the earning value of the play.

I have received money from the production of "After Dark" for the use of the railroad scene in "After Dark." I never had any right to the play "After Dark" except in the railroad scene. I have received money for permission to produce the railroad scene from Jarrett & Palmer and from Dion Boucicault himself and from an actor named King Hedley. I received from Jarrett & Palmer fifty dollars a performance, from Dion Boucicault one hundred and fifty dollars a week. I doubt if I have any of the writings with these persons in my possession, it is so long ago.

This paper shown me is the agreement with King Hedley.

Agreement offered and marked Plaintiff's Exhibit No. 2 for identification.

I received moneys from King Hedley under this agreement. I have never been asked to license the production of any part of this play of "Under the Gaslight" or any scene in it except the railroad scene.

Cross-examination:

The firm of Jarrett & Palmer I referred to in my direct examination is the firm that was sued by me in the action commenced in the United States circuit court, in which they contested my rights, and it was after the termination of the motion for the injunction, in my favor, that this arrangement was made. It was by way of compromise, because of the threats I made that I would sue

335 under the statute to get what I claimed were my rights. An agreement was made to pay me so much after the suit. The suit was in 1867, and this arrangement was something after 1867,

of course. It was just about that time. They compromised by giving fifty dollars for each performance they gave up to that time and following that. The play was going on when the suit was decided in my favor, and the injunction would have stopped them if they had not compromised; so the performances still went on. The play was drawing a great deal of money. It would have necessitated stopping the performance of this particular scene in view of that injunction, but for this compromise. They valued the scene so.

In regard to Dion Boucicault, to whom I referred as having paid me something, he is dead, and he paid me one hundred and fifty dollars for one week's performance in Brooklyn within ten years ago, I think it was. He had licensed "After Dark" to a manager in Brooklyn. When the announcement was made of the performances intended to be given I threatened to stop them, and in order to permit him to carry out his contract with the local manager in Brooklyn to perform the play he had to pay me twenty-five dollars for each performance.

In regard to King Hedley I commenced a suit against him in order to compel him to pay under the contract marked Exhibit 2 for identification, and I think he paid in full. I think he settled with Mr. Olin. I cannot remember what his plea was, but he finally settled. I think he paid me ten dollars a performance. I do not remember how much he paid under this contract, and I cannot remember how much he paid before suit was commenced.

I think there was involved in that suit against him between two and four hundred dollars—about four hundred dollars for thirty or forty performances.

The other parties whom I have spoken of are parties whom I had authorized or licensed to perform my entire play. I referred
336 to the early ones. They were the Worrell sisters, who produced the play the first and second year of the production of the same, some twenty-five or twenty-eight years ago.

The next was Rich & Harris of Boston, about the same time—within three years of the production. Wheatley was about the same time. He was going to California and Australia to produce the original in these places.

In those years the play was a great success—about the time I first brought it out.

I licensed Mr. Turner within the past few years; I had litigation with him. I do not remember how much he paid me, and cannot recall how the litigation terminated.

I produced within the past year or two at Niblo's Garden, New York, a play entitled "Undercurrents." I do not remember that it was produced after the decision of Judge Wallace in the case brought by me against Webster and Brady. I cannot remember the dates now. The play ran at Niblo's Garden a couple of weeks and was then taken off. It was a financial failure, and was not produced after that at any theatre.

The railroad scene as produced in "Under the Gaslight" was also partly embodied in "Undercurrents."

"Undercurrents" was a combination of several plays, and had in

it the railroad scene from "Under the Gaslight," and it had the sensations of other plays.

Within the past month I received royalties for "Under the Gaslight." It was from a manager in Boston, who announced without my permission the production of the play, and he was called upon by my manager there, and he settled up by paying ten dollars a performance. I do not recall the theatre where it was produced, or the name of the manager. It was produced one week. He settled up about the middle of the week, when I threatened to stop the performance. He played the entire play of "Under the Gaslight."

337 Redirect examination:

I doubt since the production of "Under the Gaslight," the original production, that a year has elapsed that I did not receive some amount from it. The receipts have been variable. In its freshness, of course, I got more than I did when the play got older and older. It is an extraordinary play that lives beyond ten years nowadays.

Recross-examination:

I was examined as a witness on my own behalf in the suit brought by me against Webster, Brady and Miner, and I did testify there that I had a contract with a man named Turner of one hundred dollars a week, and that after the publication of the question as to my rights Turner refused to pay his later royalties and gave me no end of trouble in regard to that, and the publication of that was much the cause of my having no contract the following year, for this prevented young Arthur Rehan taking the play in hand and going through the West and North and South, and he would give seventy-five dollars a week. I said scarcely a year from the time of the production that I had not received some compensation for the play.

Redirect examination:

Referring to the same cross-examination, I remember saying to counsel, "I should say my royalties for ten years have never been less than $1,000 a year." I remember being asked what I would say was the value of my play in 1886, and answering "at least $1,000 a year." My answer was true at that time. I should at least expect to realize $1,000 a year from it.

Plaintiff's counsel now offered in evidence the two agreements, identified by Mr. Daly, the first being an agreement of Augustin Daly with King Hedley, dated in December, 1885, and the
338 second an agreement of Augustin Daly with Philip T. Turner, dated July 8, 1886. Defendant's counsel objects to these papers on the following grounds:

1st. That they are not about the time of the alleged infringement, but long anterior thereto.

2d. That the one paper, which has been marked No. 1 for identification with Turner has special reference to a performance of the entire play "Under the Gaslight" for $75 a week, and not to this

particular scene, and therefore is no evidence of the value of any license for this scene.

3d. That the agreement marked No. 2 for identification with Hedley was made long prior to the alleged infringement, and had no reference to the particular matter which is charged to have been infringed or found to have been infringed, and of itself is no evidence of the value of this scene as such.

The COURT: I will admit them both for what they are worth.

Objection overruled. Exception.

Papers offered in evidence were marked, respectively, Plaintiff's Exhibits 3 and 4.

PLAINTIFF'S EXHIBIT NO. 3.

This agreement between Augustin Daly, of the city of New York, party of the first part, and King Hedley, of the same place, party of the second part.

Whereas, the said Hedley is the manager of a dramatic company, and is engaged in giving performances of a play entitled "After Dark."

And whereas he is desirous of obtaining the consent of the said Daly to the use by the said Hedley of the scene in the said play known as the railway scene.

339 Now this agreement witnesseth that the said Daly in consideration of the agreements hereinafter contained on the part of the said Hedley to be performed hereby consents to the performance by the said Hedley of the said play of "After Dark" at any place in the United States except the city of New York.

And in consideration of such consent and of one dollar to him paid, the said Hedley promises and agrees to pay to the said Daly the sum of ten dollars for each and every performance of the said play "After Dark," or of the railroad scene therein which may be given by the said Hedley or under his permission or authority. Payments are to be made weekly to the said Daly at Daly's theatre in the city of New York. If the said Hedley shall omit to make any of the payments provided for by this agreement the same shall terminate at the option of the said Daly within twenty days after the said omission.

In case the said Hedley shall cease to give performances of the said play and shall not recommence the same within a period of three months after such cessation this agreement shall cease and determine unless continued by the parties hereto in writing.

Nothing herein contained shall be construed to affect the rights of the parties by reason of the performances by the said Hedley of the said play "After Dark" prior to December 14, 1885.

In witness whereof we have hereunto set our hands the 17th day of December, 1885.

AUGUSTIN DALY,
By S. H. OLIN, *Att'y.*
KING HEDLEY.

340 PLAINTIFF'S EXHIBIT No. 4.

Memorandum of agreement made this 8th day of July 1886 by and between Augustin Daly manager of Daly's theatre New York and P. T. Turner manager at New York for themselves and their respective executors administrators and assigns, to wit viz:

Said Daly hereby sells to said Turner the exclusive right to give performances of the play of "Under the Gas Light" for thirty consecutive weeks during the theatrical season of 1886–'7 commencing on or about Monday September 13th 1886 in all cities and towns in the United States and Canadas, not more than one performance each night to be given during said period and not more than one matinee on any day.

The said Turner hereby agrees to pay said Daly the sum of seventy-five dollars ($75) each week, for thirty (30) consecutive weeks, commencing the first Saturday after said performances begin, payable to said Daly in the city of New York.

The said Turner also agrees to print in distinguishable manner the name of Augustin Daly, as author of said play, in each advertisement, poster and bill at said performance.

In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

AUGUSTIN DALY,
By S. H. OLIN, *Att'y.*
PHILIP T. TURNER.

(Plaintiff rests.)"

And the clerk of the U. S. circuit court is hereby directed to make said changes and amendments to the original transcript of record as settled and filed in his office the 25th day of August, 1896, said amendments to take effect *nunc pro tunc* as of 25th day of August, 1896.

341 It is further adjudged that the plaintiff in error be and he hereby is permitted and allowed to file the following additional assignment of error *nunc pro tunc* as of September 23, 1896:

"XXXV. That the court erred in excluding evidence offered on behalf of the plaintiff in error to show that the play 'After Dark' drew as much money and was as valuable in a pecuniary sense and in a commercial sense, with the railroad scene performed in a manner not violative of defendant in error's rights, as when performed in a manner held to be violative of the rights of defendant in error.

That the full substance of the evidence excluded is, that the plaintiff in error called a witness, J. Charles Davis, and sought and offered to prove that when the play 'After Dark' was performed with the railroad scene, in which the character in danger of his life from a passing train rescued himself by staggering off the track, the play drew as much money and was as valuable in a pecuniary sense and in a commercial sense as was the same play when produced with the railroad scene represented with one character in danger of his life rescued by another character."

N. SHIPMAN,
Circuit Judge.

We hereby consent to the entry of the foregoing order.
Dated April 14, 1897.

OLIN & RIVES, *Att'ys for Pl't'ff.*
DITTENHOEFER, GERBER & JAMES,
Att'ys for Def't.

342 U. S. Circuit Court, Southern District of New York.

AUGUSTIN DALY, Plaintiff,
against
WILLIAM A. BRADY, Defendant.

It is hereby stipulated and agreed, that the clerk of the United States circuit court certify to United States circuit court of appeals in regard to certain amendments to the bill of exceptions and case on appeal as settled and filed herein on 25th August, 1896, which amendments are fully set forth in a certain order entered herein on 15th day of April, 1897, and that said clerk of the said court cause the said amendments to be printed and inserted in the said Transcript of Record as sent up to said U. S. circuit court of appeals.
Dated 15th April, 1897.

OLIN & RIVES, *Attorneys for Plaintiff.*
DITTENHOEFER, GERBER & JAMES,
Attorneys for Defendant.

So ordered.
April 17, 1897.

N. SHIPMAN, *U. S. J.*

343 United States Circuit Court of Appeals, Second Circuit.

WILLIAM A. BRADY, Plaintiff in Error,
vs.
AUGUSTIN DALY, Defendant in Error.

This case comes here upon a writ of error brought by the defendant below to review a judgment rendered in the circuit court in favor of the plaintiff. The action was brought under section 4966, U. S. Revised Statutes, which provides that any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than $100 for the first and $50 for every subsequent performance, as to the court shall appear to be just. The history of the litigation and the facts on which the judgment now under review was entered are as follows:

On August 1, 1867, the plaintiff, Daly, duly copyrighted a dramatic composition or play, in five acts, of which he was the author, owner, and exclusive proprietor, entitled "Under the Gaslight." The play was subsequently produced by the plaintiff. It pleased the popular taste and was successful and profitable, the plaintiff having received as fees from different persons performing the same

under his license substantial license fees in almost every year
344 since 1868. The popularity of the play seems to have depended in large measure upon a scene in the fourth act known as the "railway scene." Precisely what that is may be seen by references to the opinions cited *infra* from 6 Blatchf. and 4 C. C. A. Soon after the play was produced Dion Boucicault, without the consent of plaintiff, prepared a play called "After Dark," in which he introduced a scene varying slightly from the railway scene as it appeared in "Under the Gaslight," so as to be colorably different, but substantially the same. Boucicault's play was performed in New York by one Palmer, against whom Daly brought suit in the circuit court, southern district of New York. He obtained an injunction, Judge Blatchford filing an elaborate opinion, in which he held that the "railroad scene" in plaintiff's play was a dramatic composition within the meaning of the copyright statutes; that plaintiff was as much entitled to protection in respect of a substantial and material original part of it as he was in respect to the whole; that the "railroad scene" in Boucicault's play contained everything which makes the "railroad scene" in plaintiff's play attractive as a representation on the stage, and that it infringed plaintiff's copyright. Daly *v.* Palmer, 6 Blatchf., 256 (Dec., 1868).

Some time prior to May, 1889, the defendant in the action at bar, William A. Brady, in connection with others, without consent of plaintiff, began to produce on the stage the said play of "After Dark," including the railroad scene. On May 20, 1889, plaintiff
began a suit in equity for injunction and accounting against
345 Brady and his associates, in the same circuit court. An application for preliminary injunction was denied, upon the ground that there was a material variance between the registered title and the published title of "Under the Gaslight." Daly *v.* Brady, 39 Fed. Rep., 265. When the equity suit came on for final hearing the judge at circuit followed the decision on motion for preliminary injunction and dismissed the bill. Daly *v.* Brady, 47 Fed. Rep., 903 (Nov. 4, 1891). The plaintiff promptly appealed, and the cause came before this court for argument on May 13, 1892, and its decision will be found reported under the title Daly *v.* Webster, in 1 U. S. App., 573; 4 C. C. A., 10. We reversed the decision of the circuit court as to the supposed variances in title and held that the plaintiff's railroad scene was a dramatic composition; that it was protected by copyright; that the railroad scene in After Dark, as Boucicault composed it and as it had been performed by defendant (the imperiled person being saved from death by the aid of a "rescuer") was an infringement, but that if performed without the introduction of a "rescuer" it would not infringe. There was evidence in that suit showing that defendant had produced the scene sometimes unchanged from Boucicault's and sometimes without an independent "rescuer," the imperiled person saving himself by inadvertently operating a switch. In conformity with the mandate of this court, a decree for perpetual injunction against defendants was entered November 5, 1892, and it was referred to a master to

take proof of the number of performances given by the defendants and where each performance took place, the defendants being
346 required to attend, give evidence, and produce *their* books and papers. Upon said examination defendant's counsel objected to the defendant being compelled to produce the manuscript play of "After Dark," upon the ground that " neither the defendant nor his books can be used against him in any proceeding wherein it is sought to obtain a penalty or for the purposes of this hearing before the master." The decree did not direct the master to ascertain anything in regard to profits. No evidence was offered upon that subject, and no finding was made thereon. A final decree in said cause, accepting the master's report and making the findings of the master the findings of the court, was entered on April 1, 1893. No judgment or decree for profits was asked or rendered.

The action now under review was begun on July 14, 1893. As before stated, it is to recover statutory damages under section 4966 of the U. S. Revised Statutes. Issue being joined by the service of an answer, the cause came on for trial before Judge Shipman, sitting with a jury, on May 29, 1895; whereupon the parties, by their attorneys of record, filed with the clerk a stipulation in writing waiving a jury, in conformity to section 649, U. S. Rev. Stat., and the trial proceeded before the court without the jury. The plaintiff offered in evidence the record in the equity suit against Brady and others, which was admitted " for certain purposes; " and, having offered some testimony to show plaintiff's actual damages from the alleged infringement, he rested. The record thus ad-
347 mitted contained the finding of the master adopted by the circuit court as to the number of times that the play of "After Dark " with the infringing scene had been publicly produced by defendant. The evidence upon which this finding was based was extorted from the defendant by the plaintiff's examination of him before the master in the equity suit. Defendant thereupon introduced some evidence and offered more, which was rejected, and exception to such rejection reserved. The rejected evidence will be found referred to in the discussion of exceptions in the opinion *infra*. Having taken his proofs and offered whatever testimony he chose to present, defendant rested. The court took the case under advisement, and on June 24, 1895, filed special findings of fact and conclusions of law.

The findings of fact set forth substantially what has been hereinbefore rehearsed. The court found as conclusions of law that Daly's copyright was good and valid; that it covered and protected his " railroad scene; " that the acts of defendant in producing "After Dark," including its railroad scene, without plaintiff's consent, were in disregard of said copyright and violated plaintiff's exclusive rights thereunder; that the damages recoverable for such violation would be as prescribed in section 4966, but that there could be no recovery on the proofs submitted, because there was no testimony before the court showing the number of infringing performances, except the record in the equity case adopting the finding of the

master, which finding was based on evidence extorted from
348 the defendant by examination in such suit; that section 4966, although it used the word damages only, in reality imposed a penalty; that the two years' statute of limitations (sec. 4968) applied, and that evidence obtained from a party by means of a judicial proceeding must not be used against him for the enforcement of a penalty.

Thereupon and before judgment was entered plaintiff moved for a new trial, or such other and further relief as might be just. On November 4, 1895, the court granted the motion "to the extent that the cause be opened for the purpose of allowing either party to present additional testimony in regard to the numbers and times of the representations, if any there were, of the play 'After Dark' by the defendant within two years prior to the commencement of this suit." The cause came on before the same judge on April 9, 1896, and the plaintiff produced the testimony of various witnesses as to the number of times defendant had within the period limited produced "After Dark" with the railroad scene unaltered—*i. e.*, with an independent rescuer. Defendant offered no proof, and the cause was submitted. On July 14, 1896, the court filed special findings of fact upon the new proofs, holding that "After Dark" had been publicly produced by defendant and his agents without plaintiff's consent for more than two years before August 23, 1893; that such performances took place at least 125 times between August 24, 1891, and October 5, 1892, and that after the latter date a change was made by the defendant in the representation of the railroad
349 scene whereby the infringement ceased. The court expressly stated that the evidence as to these performances and all performances subsequent to August 24, 1891, "is entirely independent of the evidence obtained from the defendant by the plaintiff's examination of him in the accounting before the master in the equity suit mentioned in the prior findings of fact. No pleading or evidence of the defendant has been used or taken in evidence in ascertaining any facts as to performances or for the enforcement of any alleged liability in this case."

Upon the new testimony, with the rest of the evidence, the court found as a conclusion of law that plaintiff was entitled to judgment of $50 for each of the 126 performances, amounting to the sum of $6,300, with costs. Judgment was duly entered for that sum, and defendant sued out this writ of error.

LACOMBE, *Circuit Judge:*

There are thirty-four assignments of error, but it will be necessary to discuss only those which are relied upon in the brief of plaintiff in error.

First. It is contended that the penalty is incurred only when substantially the whole of a copyrighted play is reproduced. This contention, however, has been already disposed of by this court. The penalty of the statute is imposed when "any dramatic compo-

sition for which a copyright has been obtained" is publicly
350 performed without the consent of the owner. In Daly *v.* Webster, 1 U. S. App., 573; 4 C. C. A., 10, we held the railroad scene in "Under the Gas Light," considered by itself, apart from all the other acts and scenes in such play, to be a dramatic composition and as such protected by the copyright which plaintiff had obtained; and no reason is shown for reversing or modifying that decision. When any one, without owner's permission, publicly performs substantially that whole railroad scene, he substantially performs a dramatic composition which is covered by the owner's copyright.

Second. It is contended that it was error "to exclude evidence offered by defendant that the manner of the rescue is not a material part of plaintiff's play." We have searched the record carefully, but in vain, for any such offer. It does appear that defendant "offered to prove that the play 'After Dark' drew as much money and was as valuable in a pecuniary or in a commercial sense with the railroad scene performed in the manner not violative of plaintiff's rights, as held by the circuit court of appeals," and to support his offer asked a witness who had testified as to performances of "After Dark" this question: "Will you state the difference in business between the railroad scene as performed when one character was rescued by another and as performed when the character rescued himself by staggering off the track?" The question was excluded and exception reserved. If it were material and proper for defendant to show that the "manner of the rescue" was
351 "not a material part of" Under the Gaslight, he certainly wouldn't show it by proving that the manner of the rescue was not a material — of the other play, "After Dark."

Third. It is next assigned as error that the court below permitted defendant's answer in the equity suit to be used against him in this action. The "answer" came in as part of the record in the equity suit. When such record was offered by plaintiff, defendant objected to its introduction on eight separate grounds, which were set forth specifically, but not on the ground that a sworn pleading of the defendant was offered against him in an action to enforce a penalty. Incidentally it may be noted that in the answer in the action at bar defendant repeatedly refers to the record in the equity suit, and asks that the first decree of the circuit court therein and the proofs upon which it was granted be made a part of his answer. It may well be doubted whether he is now in a position to urge the assignment of error above set forth, but if he were it certainly should not avail him. The answer in the equity suit contained no admission obtained from the pleader by the equity court. It denies all the material allegations of the complaint. Undoubtedly, as pointed out in the brief, it does admit that performances of "After Dark" were given by defendant, but only of the version which did not infringe. In view of the fact that the record in the equity suit was admitted "for certain purposes" only, and the statement by the circuit judge that no pleading of the defendant has been used or

taken in evidence in ascertaining any facts as to performances or for the enforcement of any alleged liability in this case, we are unable to find any harmful error in the admission of the answer in the equity suit.

Fourth. It is next assigned as error that the court below held that the decree in the equity suit of itself established plaintiff's cause of action, and was *res adjudicata* as to plaintiff's copyright and defendant's alleged infringement.

Manifestly the court below did not hold that the "decree in the equity suit of itself established plaintiff's cause." When that decree was the only evidence it declined to find for the plaintiff. Nor is there anything to show that the court held that the equity decree was *res adjudicata* as to defendant's alleged infringement. The record in the equity suit was competent evidence of the fact that the railroad scene in "After Dark," the unaltered version, was substantially identical in words, action, circumstance, and accessories with the railroad scene in "Under the Gaslight," and defendant offered no evidence to controvert it. The court, however, did hold that the validity of the copyright, being determined by the equity decree, was *res adjudicata* between the parties to the action at bar, and excluded evidence offered by defendant (being the same evidence considered in the equity suit) to show that plaintiff's railroad scene was not novel. In this there was no error. The question of validity was one of the issues in the equity suit, and that court adjudged that the copyright obtained by Daly on August 1, 1867, was good and valid, that he was the author of the dramatic composition entitled "Under the Gaslight," and that the railroad scene in such play was itself a dramatic composition and protected by said copyright. To this equity suit Daly and Brady were parties.

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The action at bar is not brought by the Government, but by the individual whose rights have been trespassed upon, to recover the damages which the statute gives him from the individual who has committed the trespass. Both parties to the action were parties to the suit, and under familiar principles a question at issue between them which has been once finally decided by a court of competent jurisdiction cannot be again contested between them in the same or any other court.

Fifth. It is further contended that the court below committed error in limiting the defendant upon the new trial to proof as to the number of performances. The record fails to disclose that defendant offered any evidence at all on the second trial or that any was excluded. The order disposing of the motion for new trial provided that such motion be "granted to the extent that the cause is opened for the purpose of allowing either party to present additional testimony in regard to the numbers and times of the representation, if any there were, of the play of 'After Dark' by the defendant." It certainly did not preclude the defendant from offering any testimony which might become necessary or expedient by reason of the change of situation produced by plaintiff's additional

proof, or, indeed, from offering any which he had neglected
354 to put in through oversight. Manifestly this assignment of error is an afterthought. Had defendant had any further proof which he wished to put in, it must be assumed that he would have offered it.

Sixth. It is next contended that the trial judge "erred in permitting the plaintiff upon the new trial to present the evidence of the number of performances which was obtained from the information given by the defendant under compulsion in the equity suit."

There is nothing in the record which will enable us to say that any of the evidence presented on the second trial "was obtained from the information given in the equity suit." The counsel for plaintiff in error so asserts, but his brief contains no references to support such assertion. No witness was interrogated upon this point and no proof of the assertion offered.

Seventh. It is further contended that the performances given by defendant intermediate the decisions of the circuit court in the equity suit holding the copyright invalid and the reversal by the court of appeals were not wilful violations of plaintiff's rights, and for that reason the statutory penalty was not incurred.

The statute, however, provides that "any person publicly performing or representing, &c.," shall be liable for the damages therein fixed. It does not make wilfulness an essential element of the offence, and no authority to which we are referred calls for such a construction.

355 Eighth. It is contended that plaintiff by first proceeding in equity for an accounting for profits made an election barring him from a recovery for penalties. In view of the fact that there was in the equity cause no accounting of profits and no election to endeavor to obtain profits, and no finding and no adjudication upon the subject of profits, we are not satisfied that plaintiff made any election barring him from suing for damages or penalties.

Ninth. The last assignment of error is to the finding of the court below that there were 126 infringing performances. This, however, was a special finding by the court, a jury being waived, and an appellate court cannot look into the evidence upon which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony, and no such error is here assigned.

The judgment of the circuit court is affirmed.

356 United States Circuit Court of Appeals for the Second Circuit.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

WILLIAM A. BRADY, Plaintiff in Error,
vs.
AUGUSTIN DALY, Defendant in Error.

The writ of error in this cause from the judgment of the circuit court of the United States for the southern district of New York, in the second circuit, in favor of Augustin Daly, the defendant in error above named, and against William A. Brady, the plaintiff in error above named, for the sum of six thousand six hundred and forty-five and $\frac{13}{100}$ dollars, entered and filed in the office of the clerk of the said circuit court of the United States for the southern district of New York, in the second circuit, on the 17th day of December, 1896, having regularly come on to be heard and having been argued by the respective counsel, and due deliberation having been had thereon, now, on motion of Olin & Rives, attorneys for Augustin Daly, the defendant in error above named, it is—

Ordered, adjudged, and decreed by this court that the said judgment of the circuit court of the United States, southern district of New York, in the second circuit, in favor of Augustin Daly, the defendant in error above named, and against William A. Brady, the plaintiff in error above named, be, and the same is hereby,
357 affirmed, with costs to the said Augustin Daly, the defendant in error above named, against William A. Brady, the plaintiff in error above named; and it is further—

Ordered, adjudged, and decreed that a mandate forthwith issue out of this court to the circuit court of the United States for the southern district of New York, in the second circuit, directing that the said judgment be affirmed with costs, as aforesaid.

W. J. W.
E. H. L.

Endorsed: U. S. circuit court of appeals for the second circuit. William A. Brady, pl't'f in error, *vs.* Augustin Daly, def't in error. Order of affirmance and notice of settlement. Olin & Rives, attorneys for def't in error, 32 Nassau St., Mutual Life building, New York city. Due and timely service of a copy of the within order and notice is hereby admitted this 3rd day of Dec'r, 1897. Dittenhoefer, Gerber & James, att'ys for pl't'f in error. United States circuit court of appeals, second circuit. Filed Dec. 6, 1897. William Parkin, clerk.

358 Supreme Court of the United States.

WILLIAM A. BRADY, Plaintiff in Error,
vs.
AUGUSTIN DALY, Defendant in Error.

To the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States:

The petition of William A. Brady, plaintiff in error, respectfully shows as follows:

First. That the said action was commenced on the 14th day of July, 1893, by the service of the summons, and was brought to recover the sum of thirty-seven thousand dollars ($37,000), claimed by the plaintiff (defendant in error); that the said plaintiff was the author of a play entitled "Under the Gaslight," a romantic panorama of the streets and homes of New York; which play or dramatic composition said plaintiff claimed to have copyrighted under and pursuant to the statutes of the United States in such cases made and provided, and in which play or dramatic composition there was a scene or incident termed a "railroad scene," in which a character placed or tied across a railroad track in danger of his life from a passing train is rescued by a third person; and the said plaintiff claimed that the defendant performed a play entitled "After Dark," in the course of the performance of which play there was a scene or incident of a railroad and a rescue of a character in danger of his life from a passing train; which rescue it is claimed was a violation and infringement of the rights claimed by the plaintiff.

359 Second. That the complaint was served August 23, 1893, and issue was joined by the service of the defendant's answer December 29, 1893, and the filing of the application of the plaintiff June 14, 1894; that the issues in this action were brought to trial on the 29th day of May, 1895, before Honorable Nathaniel J. Shipman, circuit judge, and the parties having stipulated in writing and filing with the clerk before the trial of said action that the issues of fact therein should be tried and determined by the court without the intervention of a jury, under sections 649 and 700 of the Revised Statutes of the United States, said issues were duly tried before the said court, and the court did on the 24th day of June, 1895, hand down and file with the clerk of the United States circuit court for the southern district of New York special findings, wherein and whereby, among other things, the court directed and decided that the complaint of the plaintiff be dismissed on the merits, with costs; and thereafter and on the 21st day of October, 1895, the said plaintiff made a motion for a new trial before the said judge, who, on the 15th day of November, 1895, made and filed an order with the clerk of said circuit court granting the motion for the new trial to the extent that the cause be opened for the purpose of allowing either party to present additional testimony in regard to the numbers and time of the performances, if any there were, of the play "After Dark" by the defendant within two years prior to the commencement of this suit, and for the production of such testimony this

case was set down to be heard and was subsequently heard on the 9th day of April, 1896, and the court (said judge presiding) did on the 4th day of July, 1896, hand down and file additional
360 special findings, among other things finding and deciding that the plaintiff was entitled to judgment against the defendant for the sum of sixty-three hundred ($6,300) dollars, with costs; to which decision and findings the defendant (plaintiff in error) duly filed exceptions with the clerk of the said circuit court on the 3d day of August, 1896; and thereafter and on the 17th day of September, 1896, judgment was duly entered in this action adjudging that the plaintiff recover of the defendant (plaintiff in error) the sum of sixty-three hundred dollars, together with costs and disbursements amounting to three hundred and forty-five and $\frac{12}{100}$ dollars, and that the plaintiff have execution therefor.

Third. That thereafter and on the 22nd day of September, 1896, on application of your petitioner, a writ of error was duly allowed, directed to the judges of the circuit court of the United States for the southern district of New York, commanding them to send the record and proceedings and all things concerning the same to the judges of the United States circuit court of appeals for the second circuit; that assignments of error were duly filed, and the defendant in error, Augustin Daly, duly filed a joinder in error, and such proceedings were thereupon had in and before the said circuit court of appeals in and for the second circuit that on the 6th day of December, 1897, the said circuit court of appeals did make and render a judgment, wherein and whereby it was ordered, adjudged, and decreed by the said circuit court of appeals that the judgment of the said United States circuit court, southern district of New York, in and for the second circuit, in favor of Augustin Daly, the defend-
361 ant in error, against William A. Brady, the plaintiff in error, be affirmed, with costs to the said Augustin Daly against the said William A. Brady; and it was further ordered, adjudged, and decreed that the mandate issue out of said court to the circuit court of the United States, southern district of New York, for the second circuit, accordingly.

Fourth. This defendant is advised and believes that there are manifest errors in the said judgment, record and proceedings, and feeling aggrieved thereby, prays that a writ of error may be issued to the United States circuit court of appeals for the second circuit, directed to the honorable judges of the United States court of appeals for the second circuit, requiring them to send the record and proceedings in this action to the Supreme Court of the United States at a time therein mentioned, and for such other and further relief as may seem just.

And your petitioner will ever pray.

WM. A. BRADY.
A. J. DITTENHOEFER,
Attorney for Petitioner and Plaintiff in Error,
William A. Brady, 96 Broadway, N. Y. City.

362 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

William A. Brady, being duly sworn, says that he is the defendant in this action, the plaintiff in error above mentioned; that he knows the contents of the foregoing petition, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WM. A. BRADY.

Sworn to before me this 31st day of December, 1897.

H. G. WILEY,
Notary Public, Queens Co.

Cert. filed in N. Y. Co.

Endorsed: Supreme Court of the United States. Wm. A. Brady *vs.* Augustin Daly. Original petition. A. J. Dittenhoefer, attorney for plaintiff in error, 96 Broadway, New York. United States circuit court of appeals, second circuit. Filed Feb. 19, 1898. William Parkin, clerk.

363 United States Circuit Court of Appeals for the Second Circuit

AUGUSTIN DALY }
vs.
WILLIAM A. BRADY. }

Know all men by these presents that we, William A. Brady and John Farrell, are held and firmly bound unto the above-named Augustin Daly in the sum of three hundred dollars, lawful money of the United States, to be paid to the said Augustin Daly, his executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and assigns, jointly and severally, by these presents.

Sealed with our seals; dated this 31st day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas William A. Brady has prosecuted a writ of error in the Supreme Court of the United States to the United States circuit court of appeals for the second circuit to reverse the order made by said United States circuit court of appeals herein, directing that a mandate issue to the circuit court of the United States for the southern district of New York, which mandate directs the said circuit court to enter judgment affirming the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of New York:

364 Now, therefore, the condition of this obligation is such that if the said William A. Brady shall prosecute said writ of error to effect and answer all costs if he shall fail to make his plea

good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. A. BRADY. [L. S.]
JOHN FARRELL. [L. S.]

365 CITY AND COUNTY OF NEW YORK, *ss:*

John Farrell, being duly sworn, deposes and says that he is worth the sum of one thousand dollars over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

JOHN FARRELL.

Sworn to before me this 31st day of December, 1897.

H. G. WILEY,
Notary Public, Queens Co.

Cert. filed in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

I certify that on this 31st day of December, one thousand eight hundred and ninety-seven, before me appeared the above-named William A. Brady and John Farrell, to me known and known to me to be the individuals described in and who executed the above instrument, and they severally duly acknowledged to me that they executed the same for the purposes therein mentioned.

H. G. WILEY,
Notary Public, Queens Co.

Cert. filed in N. Y. Co.

Approved as bond for costs.

DAVID J. BREWER,
Associate Justice Supreme Court.

Feb'y 16th, 1898.

Endorsed: United States circuit court of appeals for the second circuit. Augustin Daly *v.* William A. Brady. Original bond. A. J. Dittenhoefer, attorney for plaintiff in error, 96 Broadway. United States circuit court of appeals, second circuit. Filed Feb. 19, 1898. William Parkin, clerk.

366 Supreme Court of the United States.

WILLIAM A. BRADY, Plaintiff in Error,
against
AUGUSTIN DALY, Defendant in Error. } Assignments of Error.

Afterwards, to wit, on the 16 day of February, 1898, before the justices of the Supreme Court of the United States comes William A. Brady, plaintiff in error, by A. J. Dittenhoefer, his attorney, and says that in the record and proceedings in the above-entitled cause

in the United States circuit court of appeals for the second circuit there is manifest error, to wit:

First. Plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said circuit court of appeals.

Second. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the southern district of New York to said circuit court of appeals, erred in making its order on the 6th day of December, 1897, affirming the judgment of the said circuit court and directing a mandate to issue to the circuit court of the United States for the southern district of New York, directing that court to proceed in accordance with the decision and order of the said circuit court of appeals.

367 Third. That said circuit court of appeals erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said circuit court, and in not directing a new trial of the issues raised by the pleadings in said action.

And said William A. Brady, plaintiff in error, prays that judgment aforesaid, entered herein in the circuit court for the southern district of New York, and the order entered herein, as aforesaid, by the circuit court of appeals, and the judgment of affirmance to be entered in said circuit court for the southern district of New York upon said order of affirmance, and for the other errors in the record and proceedings aforesaid, be reversed and annulled and altogether held for naught, and that the plaintiff in error may be restored to all things which he hath lost by occasion of said judgments and order.

A. J. DITTENHOEFER,
Att'y for Plaintiff in Error, 96 Broadway, N. Y. City.

(Endorsed:) Wm. A. Brady *v.* Augustin Daly. Original assignments of error. A. J. Dittenhoefer, att'y for pl't'f in error, 96 Broadway, N. Y. city. United States circuit court of appeals, second circuit. Filed Feb. 19, 1898. Wm. Parkin, clerk.

368 UNITED STATES OF AMERICA, *ss:*

To Augustin Daly, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein William A. Brady is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the

Supreme Court of the United States, this 16th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

369 I hereby accept and admit service of a copy of the within citation on behalf of Augustin Daly, defendant in error herein, this 21st day of February, 1898.

S. H. OLIN,
Attorney for Augustin Daly.

[Stamped:] United States circuit court of appeals, second circuit. Filed Mar. 1, 1898. William Parkin, clerk.

370 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 369, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of William A. Brady, plaintiff in error, against Augustin Daly, defendant in error, as the same remain- of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

371 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between William A. Brady, plaintiff in error, and Augustin Daly, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme

Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Stamped:] United States circuit court of appeals, second circuit. Filed Feb. 19, 1898. William Parkin, clerk.

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In the

Supreme Court of the United States

OCTOBER TERM, 19

Term, April, A. D. 1899

WILLIAM A. BRADY,

Plaintiff in Error,

vs.

AUGUSTIN DALY,

Defendant in Error.

Brief of Plaintiff in Error.

A. J. DITTENHOEFER,

Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

WILLIAM A. BRADY, Plaintiff in Error, *against* AUGUSTIN DALY.	No. 273.

This case comes before this Court on a writ of error to the Circuit Court of Appeals for the Second Circuit, allowed by Mr. Justice Brewer (pp. 185–186).

The action was brought under Section 4966 of the Revised Statutes to recover penalties for certain performances alleged to have been given by Brady, the plaintiff in error (defendant below) of the play "After Dark." In said play there is a scene of a locomotive and cars crossing the stage while one of the characters is on the track in danger of his life from the passing train; and the contention of the defendant in error (plaintiff below) is that a single incident in that scene, to wit: the *manner of the rescue of the endangered character* violated the copyright of his play "Under the Gaslight, a Romantic Panorama of the Streets and Homes of New York."

On the 20th day of May, 1889, defendant in error commenced a suit in equity against George P. Webster, the plaintiff in error William A. Brady and Henry C. Miner claiming that the *entire railroad scene* in "After Dark" (37) was taken from said copyrighted play, "Under the Gaslight."

A motion for an injunction *pendente lite* was, on *June 20, 1889*, denied by Judge Wallace, who held complainant's copyright invalid (see Order Defendant's Exhibits B, 50–51 ; Findings 19).

On final hearing on *November 4, 1891*, the Circuit Court, Judge Coxe presiding, following the decision of Judge Wallace, dismissed the bill of complaint on the merits, with costs (see Defendant's Exhibit C, 51 ; Findings, 19).

On appeal by the complainant, defendant in error, the Circuit Court of Appeals reversed the said decree on the *4th of October, 1892* (Findings, 19).

The play performed by the defendants in said suit was *concededly dissimilar in every particular from complainant's play* "Under the Gaslight," excepting as to the railroad scene.

The Circuit Court of Appeals held, in the equity suit, that the incidents of a train of cars passing in view of the audience and of a character in imminent danger of his life from the train, were old and did not belong to the complainant. The only incident sustained as new and original with him was the *manner in which the one character was rescued by the other.* The following is the language used by the Court:—

"On another occasion, however, defendant's "play was so modified that the imperilled person "was placed upon the tracks, so stupefied with "some drug as to be unable to intelligently direct "his own movements, and so environed (the scene "is laid in a narrow tunnel) that it seemed reason-

" ably certain he would be in his place of peril
" when the train arrived. So far the change of in-
" cident made no material change in the story, but
" he was saved from death, *without the aid of any*
" *third person*, at one time by staggering off the
" rails in time, at another by striking inadvert-
" ently against the operating arm of a switch,
" which moved, and thus side-tracked the train.
" This grouping of the incident, dispensing, as
" it does, entirely with the rescuer, whose efforts
" to aid and whose struggles to overcome the
" obstacles in his (or her) way are an
" important part of the complainant's com-
" position, tell a substantially different story.
" *Moreover, in all except the rescue by a third*
" *person the complainant was not the first to con-*
" *ceive the story.* Of course, in mere peril and
" rescue—peril which the imperilled person is
" helpless to avert, rescue at the last moment by
" exertion against obstacles—there was nothing
" which any one in this age of the world could
" claim as his own. What complainant contends
" to be his own conception was the introducing of
" the moving railroad train as the source of peril,
" and confinement to its track as a method of
" assassination. But before he copyrighted his
" play, there had been published in a monthly
" magazine (the 'Galaxy') a story entitled 'Cap-
" tain Tom's Fright.' It differs entirely from
" plaintiff's play, except that it contains a 'rail-
" road scene,' in which a person is tied upon a
" railroad track, so as to be in apparent peril of his
" life from any approaching train. From this peril
" he is rescued by the circumstance unexplained
" and unexpected, that a switch had been turned
" so that the train, which did come past him,
" not on the straight track, but on a cut-off. *Such*
" *incidents of peril from railroad trains and*
" *rescue therefrom being common literary prop-*

"*erty* (it does not appear that 'Captain Tom's "Fright' was copyrighted), *it is apparent that* "*the complainant's composition is novel only by* "*reason of the introduction of the rescuer, whose* "*presence is therefore so essential to the 'dra-* "*matic composition' that a representation which* "*dispenses with his presence would not be an in-* "*fringement.*" (Italics ours.)

On that extremely narrow ground it was held that the pantomimic incident of the rescue by a third person in the railroad scene constituted the sole infringement.

The case was remanded with instructions to enter the usual decree for an accounting and a perpetual injunction (see Mandate, 52–19).

Accordingly, on the 5th day of November, 1892, a decree was entered, awarding an injunction and referring it to a master, to ascertain and report an account of the number of times the said railroad scene was used by the defendants, without the sanction of the complainant, in said dramatic composition "After Dark" and where each of said unauthorized performance took place and the terms and agreements under which said performances took place; and Daly was accorded the right to examine the defendants, their books, vouchers and documents, and they were directed to attend for such purpose before the Master, from time to time as he shall direct (53–54).

An accounting was thereupon had before the Master. *The only witness examined by the complainant was the defendant Brady*, who was subpœnaed to produce his books and papers (19). When Brady was compelled to produce the manuscript of his play, the objection made by his counsel that he could not be compelled to testify or produce his books for the reason that it would tend to render him liable to the statutory penalty, was overruled (see Findings, 19).

From the evidence thus *forced* from the defendant, it appeared that intermediate the decisions of Judges Wallace and Coxe in his favor and the reversal of those decisions by the Court of Appeals, certain performances of "After Dark" were given with the incident of the rescue in the manner held to belong to Daly; *none, however, prior to the decision of Judge Wallace and none after the reversal by the Court af Appeals* (55). Based upon that report, a final decree was entered April 1st, 1893 (Plaintiff's Exhibit 2D 61). An appeal therefrom was dismissed by this Court on technical grounds (Daly *vs.* Webster, 163 U. S., 155). This action was commenced August 23d, 1893 (see finding 24), under Section 4966 of the Revised Statutes to recover $100 for the first performance and fifty dollars for every subsequent performance given by the defendant (3–7).

The case came on for trial at the Circuit Court before Judge Shipman. The plaintiff (Daly) contended that the action *was not to recover penalties* but for damages, and tried his case on that theory. He rested his case on the introduction of the record in the equity suit (34–62), and the deposition of Mr. Daly showing royalties received by him from others who had produced his play (166). The defendant Brady sought to show the invalidity of plaintiff's copyright and that the incident of the manner of the rescue was not original with Daly, but all defenses were excluded upon the ground that the decree in equity was *res adjudicata* (63–70–77). Brady also sought to show that the incident of the rescue of an imperilled character by another in his play has no pecuniary value, and that whether the rescue be accomplished by the individual in danger of his life staggering from the track—which was held by this Court to be no infringement—or by being

removed from the track by another person, made no material difference. That evidence was also excluded (62), to which exception was duly taken and error assigned (171). Judge Shipman, took the case under advisement and subsequently rendered a decision that as the action was penal in its nature Brady's evidence in the equity suit was inadmissible and dismissed the complaint, with costs (16–21). Thereupon plaintiff moved for a new trial mainly on the affidavit of his counsel, setting forth that he had misconceived the nature of the action; that he "believed that this action was an action for damages and could be sustained without reference to the clause in the statute, which was alleged to be penal in its character," and that "the decision of the Court has taken him by surprise" (85). It was not pretended that he had *in Court, at the trial, any witness whom he did not call*, and the fact is undisputed that there was not a single witness present to testify as to the performances alleged to have been given (91).

Solely on said statement of counsel that he was mistaken as to the nature of his action and as to the proof required to sustain it, the learned Judge granted a new trial, saying that "the questions of statutory law involved in this case are important to both the parties, and the final decision by an Appellate Court upon all the accessible facts will be valuable to those interested in the law of copyright relating to dramatic compositions" (92).

On said first trial, as we have shown, counsel tried his case as an action for damages—not to recover penalties—and the Court admitted in evidence the decree in equity to prove plaintiff's cause of action, *and excluded all evidence offered by defendant on the ground that the decree was res adjudicata;* but in granting the plaintiff an op-

portunity to try his case over again upon a different theory, the learned trial Judge, instead of awarding a new trial upon *all the issues* and giving the defendant an opportunity to introduce proofs, admissible in a penal action, ordered that only "testimony in regard to the number and times of the representations, if any, there were, of the play 'After Dark,' by the defendant within two years prior to the commencement of this suit," should be admitted (92-93). The new trial was granted November 15th, 1895 (92), and was had April 9th, 1896 (93). During those five months, the plaintiff having before him the testimony of the defendant, in the equity suit forced from him before the Master showing the times and places of performances (55-61), issued commissions to take the testimony of certain members of the company performing in the play (100–131), and certain managers of the theatres where Brady's evidence in the equity suit showed the play had been produced (110–117). No proof of the other allegations of the complaint was introduced, and upon all the other issues plaintiff rested on the record in the equity suit. That record included the *verified* answer of the defendant (see Answer, Plaintiff's Exhibit 1 B, 43, and order of April 15th, 1897, amending the bill of exceptions, to show that the original answer was duly verified, 166). The answer was necessarily verified because complainant refused to waive the defendants oath (see Bill of Complaint, 37). After the second trial, Judge Shipman withdrew his decision, dismissing the complaint, and awarded judgment against the defendant for penalties amounting to $6,300, being at the rate of one hundred dollars for the first performance, and fifty dollars for each subsequent performance; the learned Judge finding that the defendant had given one hundred and twenty-six performances of "After Dark" with the rescue

conducted in the manner that violated plaintiff's copyright (24).

The plaintiff in error assigns the following as error :

1st. That the Circuit Court has no jurisdiction of an action to recover penalties, such jurisdiction being vested in the District Court.

2d. That under Section 4966, a penalty is incurred only when the entire play, or substantially the entire play, is produced—not when merely an incident in one of the scenes is reproduced.

3d. That it was error to admit in evidence in this *quasi* criminal action, the defendant's sworn answer filed by him in the equity suit, to which the oath of the defendant had not been waived.

4th. That it was error to admit in evidence the record in the equity suit as sufficient to prove the material allegations of the complaint in this penal action.

5th. That it was error to hold that the decree in the equity suit was *res adjudicata*, precluding defendant from introducing evidence that the railroad scene and the manner of the rescue were public property and not original with the plaintiff.

6th. The Court erred in holding that though the performances complained of were given intermediate the decisions of Judges Wallace and Coxe, holding the copyright invalid, and the reversal by the Court of Appeals they were wilful in a criminal sense, and that defendant was liable for the penalties provided by § 4966 of the Revised Statutes.

7th. The Court erred in holding that the plaintiff, by proceeding in equity for an accounting of profits, did not make an election precluding a recovery for penalties.

8th. The Court below, in granting a new trial, committed error in limiting the defendant in his defenses upon such new trial.

9th. The trial Judge erred in permitting the plaintiff upon the new trial, to prove the times and number of performances of "After Dark" after the defendant had been compelled in the equity suit to make said disclosure.

POINTS.

I.

The Circuit Court has no jurisdiction of an action to recover a penalty.

The Judiciary Act of 1789 provided:

> "That the District Courts shall have * * * "exclusive original cognizance * * * of all "suits for penalties and forfeitures incurred "under the laws of the United States." (§ 9).

While the Circuit Courts were given original "cognizance of all suits of a civil nature, at law or "in equity, where the matter in dispute exceeds, "exclusive of costs, the sum or value of $500," they had no original jurisdiction in suits for penalties or forfeitures arising under the laws of the United States, which jurisdiction was vested in the District Courts.

Ketland *vs.* The Cassius, 2 Dall. 365.

By the Act of 1819, (Chapter 197) the Circuit Courts were given original cognizance, "as well in "equity as at law of all actions, suits, controversies "and cases, arising under any law of the United

"States, granting or confirming to authors or in-
"ventors the exclusive right to their respective
"writings, inventions and discoveries."

Under the general patent law of 1836, (Chapter 357) the same section was re-enacted, limited, of course, to inventors. (Section 17).

In 1842, when the act supplementary to the act of 1836 was passed (Ch. 263, Sec. 5), penalties were imposed for marking unpatented articles with the name, or any imitation of the name, of any patentee of a patented article, for the purpose of deceiving the public, and it was provided, that the party so offending shall be liable, for such offense, to a penalty of not less than one hundred dollars, with costs, to be recovered by action in any of the Circuit Courts of the United States or in any of the District Courts of the United States, having the powers and jurisdiction of a Circuit Court.

The general act which gave the Circuit Courts jurisdiction as well in equity as at law, of all actions, suits, controversies and cases, arising under any law of the United States granting to authors or inventors the exclusive rights to their respective writings, inventions and discoveries, did not give the Circuit Courts jurisdiction of an action to recover a penalty under the patent law, and therefore in the act of 1842, jurisdiction was specifically vested in those Courts to recover the penalty imposed by that act.

In 1870, when the act was passed "to consolidate and amend the statutes relating to patents and copyrights," (16 St. at large, 206), the Circuit Courts were given jurisdiction of all actions, suits, controversies and cases arising under the copyright laws of the United States, "as well in law as at equity, *whether civil or penal in their nature.*"

When, however, the statutes were revised in 1874, the District Courts were given jurisdiction of all suits for penalties and forfeit-

ures incurred under any law of the United States (563, sub. 3), and Circuit Courts were vested with jurisdiction generally of all suits at law or in equity, arising under the patent or copyright laws of the United States (Section 629, Sub. 9).

It will thus be noticed that when the statutes were revised, the jurisdiction of the District Courts of suits to recover penalties or forfeiture *under any law of the United States*, was left undisturbed, and the jurisdiction of the Circuit Court in actions and suits at law or in equity arising under the patent or copyright laws of the United States, was restated in substantially the same general terms as in the act of 1819, but without giving those Courts jurisdiction of suits for penalties or forfeitures, or actions of a penal nature.

It will also be found that in revising the statutes, under the title of "Patents, Trademarks and Copyrights," Congress provided, as theretofore, that any person marking any patented article with the name of another person who has obtained a patent therefor, without the consent of such patentee, shall be liable to a penalty of not less than one hundred dollars, to be recovered, by suit *in any District Court of the United States* (Section 4901).

The Act of 1842 had vested that jurisdiction in the *Circuit Courts*.

By Section 4960 it was provided that for every failure on the part of the proprietor of any copyright to deliver to the Librarian of Congress the copies of the publication as required by the act, the proprietor of the copyright shall be liable to a penalty of $25, to be recovered by the Librarian of Congress, in the name of the United States, in an action in the nature of an action of debt, *in any District Court* of the United States within the jurisdiction of which the delinquent may reside or be found.

Section 4963 imposes a penalty for impressing

notice of copyright upon an article for which no copyright has been obtained, *without vesting the Circuit Courts with jurisdiction to recover said penalty.*

Section 4964 provides that where a person, after recording the title of a book, shall, without the consent of the proprietor of the copyright, print, publish or sell any copy of such book, he shall forfeit every copy thereof to such proprietor, and shall "also forfeit and pay such damages as may be "recovered in a civil action by such proprietor *in* "*any Court of competent jurisdiction.*"

Section 4965 provides for forfeitures for violating the rights of the proprietor of a copyright of maps, charts, prints &c., *without vesting jurisdiction in the Circuit Court*, over such actions.

Section 4966 is the one under consideration.

Section 4970 provides that the "Circuit Courts "and District Courts having the jurisdiction of "Circuit Courts shall have power, upon *bill in* "*equity*, filed by any party aggrieved to grant in- "junctions to prevent the violation of any right "secured by the laws respecting the copyrights, "according to the course and principles of Courts "of equity, on such terms as the Court may deem "reasonable."

It will thus be seen that there is no provision in the revised statutes, *expressly* vesting in the Circuit Courts jurisdiction over an action to recover a penalty, unless the general words giving the Circuit Courts jurisdiction of actions under patent and copyright laws, annul the provision giving exclusive jurisdiction to the District Courts "of *all* suits to recover penalties and forfeitures under *any* law of the United States." In fact, we find that while the supplementary act of 1842, vested the Circuit Courts with jurisdiction over penal actions in certain cases care was taken to provide that actions

for penalties shall only be brought in the District Courts (§ 4901).

In *United States* vs. *Mooney*, *116 U. S.*, *104*, this Court had occasion to construe the provisions *specifically* vesting the District Courts with jurisdiction of actions for penalties and the provisions giving the Circuit Courts *general* jurisdiction of certain classes of actions. The Court said :

> " The ninth section of the Judiciary Act of " September 24, 1789, Ch. 20, 1 Stat. 76, pro- " vided as follows: 'The District Courts shall " have exclusive original cognizance' 'of all " suits for penalties and forfeitures incurred " under the laws of the United States.' Since " the passage of that act several statutes have " been enacted giving the Circuit Courts juris- " diction of suits for penalties and forfeitures " (Rev. Stat , Sec. 629, subdivisions 4, 5, 7, 15), " but it is conceded by the counsel for the " plaintiffs that the exclusive jurisdiction of " all suits for penalties and forfeitures under " the customs laws of the United States con- " tinued in the District Courts until the pas- " sage of the act of March 3, 1875, entitled " 'An Act to determine the jurisdiction of " the Circuit Courts of the United States, Ch. " 137, 18, Stat. 470, and still continues, unless " the act mentioned gives concurrent jurisdic- " tion of such suits to the Circuit Courts. The " plaintiffs insist that such is the effect of the " first section of the act of March 3, 1875. " That section provides: 'That the Circuit " Courts of the United States shall have origi- " nal cognizance, concurrent with the Courts " of the several States, of all suits of a civil " nature, at common law or in equity, where " the matter in dispute exceeds, exclusive of " costs, the sum or value of five hundred dol-

" lars, arising under the Constitution or laws
" of the United States,' 'or in which the United
" States are plaintiffs or petitioners, &c.' The
" contention is that this section invests the
" Circuit Courts with jurisdiction, concurrent
" with the District Courts, of all suits for pen-
" alties and forfeitures under the customs laws
" of the United States. The argument to sup-
" port the contention is that the section includes
" within its terms all suits to recover penalties
" and forfeitures, because such suits are of a
" civil nature at common law and the United
" States are plaintiffs; and when the amount
" in controversy is over $500 all the conditions
" necessary to give jurisdiction are fulfilled.

" Admitting the plausibility of the argument,
" we are not able to adopt the conclusion to
" which it leads. For more than three-quar-
" ters of a century, under the ninth section of
" the Act of 1789, the exclusive jurisdiction of
" the District Courts, in suits for penalties and
" forfeitures under the customs laws was un-
" questioned. In The Cassius, 2 Dall., 365, de-
" cided in 1796 by the United States Circuit
" Court for the District of Pennsylvania, and
" in Evans *vs.* Bollen, 4 Dall., 342, decided by
" this Court in 1800, it was held that under the
" Judiciary Act of 1789 the Circuit Courts had
" no jurisdiction of suits for penalties and for-
" feitures under the laws of the United States.
" These decisions have never been overruled,
" and the law has remained unchanged, except
" where jurisdiction of suits for penalties and
" forfeitures has been given to the Circuit
" Courts in special cases by statute. This con-
" struction of the ninth section of the Act of
" 1789 prevailed, notwithstanding the pro-
" visions of section eleven of that act, which
" were as follows: 'The Circuit Courts shall

"have original cognizance, concurrent with the "Courts of the several States, of all suits of a "civil nature, at common law or in equity, "when the matter in dispute exceeds, exclu- "sive of costs, the sum or value of five hun- "dred dollars, and the United States are "plaintiffs or petitioners' (1 Stat., 78). This "is substantially the same in respect of the "question before us, as the first section of the "Act of 1875, which is relied on to take away "the exclusive jurisdiction of the Circuit "Courts. But it was never supposed that "under the Act of 1789 the provisions of Sec- "tion 11 interfered with the exclusive juris- "diction conferred on the District Courts by "Section 9 of the same act. It was never held "that the words, 'all suits of a civil nature, "at common law or in equity,' used in Section "11, included suits for penalties and forfeitures "of which the District Courts had been given "exclusive jurisdiction by Section 9. How "then, can the substantial re-enactment of "Section 11 by the Act of March 3, 1875, "with modifications immaterial, as far "as the question in hand is concerned, "have an effect which the original section did "not? As said by the Circuit Court in its "well considered opinion in this case, 11 Fed. "Rep., 476, 'the restricted meaning attached "for eighty-six years to the language of the elev- "enth section of the Act of 1789, is presumed "to attach to the same language in the Act of "1785.' It is not to be supposed that Congress, "in using in the Act of 1875 the same lan- "guage, so far as the present question is con- "cerned, as that employed in the Act of 1789 "intended to give it a meaning different from "that put upon it by this Court, and which

" had remained unchallenged for three-quar-
" ters of a century."

In *Lees* vs. *United States*, *150 U. S.*, *476*, the question arose whether the District Courts had jurisdiction to recover a penalty imposed by the Act of February 26th, 1885 (23d St., 332, Ch. 164), prohibiting the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States. The third section of the act provided that the offender shall pay for such offense the sum of one thousand dollars, to be sued for as debts of like amount are now recovered in the Circuit Courts of the United States. The Court said:

" From the earliest history of the govern-
" ment the jurisdiction over actions to recover
" penalties and forfeitures has been placed in
" the District Court. The ninth section of the
" Judiciary Act of September 24, 1789, 1 Stat.
" 73, 76 C. 20, provided as follows: 'The
" District Court shall have exclusive original
" cognizance * * * of all suits for penal-
" ties and forfeitures incurred under the laws
" of the United States.' While in the Revised
" Statutes the word 'exclusive' was omitted,
" the language was not otherwise substantially
" changed. It is true that in some cases juris-
" diction over matters of penalty and forfeiture
" has been committed to the Circuit Court,
" but this was always done by special act, and
" does not otherwise affect the proposition that
" the general jurisdiction over actions for pen-
" alties and forfeitures has been and is vested
" in the District Court. Hence, when, as here,
" a statute imposes a penalty and forfeiture,
" jurisdiction of an action therefor would vest
" in the District Court, unless it is in express

" terms placed exclusively elsewhere. If the " words, 'as debts of like amount are now re- " covered' were omitted from this last clause, " the construction claimed by counsel might be " sustained; jurisdiction would then be given " to the Circuit Courts. So, if those words " were in parenthesis, or even separated " from the last part of the clause by a comma, " or any similar punctuation, there would be " plausibility in contention; but taking the " clause as a whole, giving force to all its words, " it would seem to refer to the form of the " action rather than to the forum. When it " is remembered that a penalty may be recov- " ered by indictment or information in a crim- " inal action, or by a civil action in the form " of an action of debt, and also that the Cir- " cuit Courts of the United States are, as con- " tra-distinguished from the District Courts, " the Federal Courts of the original civil juris- " diction, the significance of this clause is " clear. It in effect provides that, although " the recovery of a penalty is a proceeding " criminal in its nature, yet in this class of " cases it may be enforced in a civil action, and " in the same manner that debts are recovered " in the ordinary civil Courts. Repeals by im- " plication are not favored, and the general " grant of jurisdiction to the District Courts of " suits to recover penalties and forfeitures " should not in any case be transferred exclus- " ively to the Circuit Courts by words of " doubtful import. In United States *vs.* " Mooney, 116 U. S., 104, a somewhat similar " effect was made to construe certain provi- " sions of a statute as divesting the District " Courts of their general jurisdiction over suits " to recover penalties and forfeitures; but, in " the face of language more significant of a

" change than that here presented, this court
" sustained such jurisdiction."

The only case we have been able to find in seeming conflict with this contention is *Taft* vs. *Stephens Lith. & Eng. Co., 37 Fed. Rep. 726* (decided in 1889).

That was a *qui tam* action brought in the Circuit Court to recover a penalty under section 4963 of the Revised Statutes and a plea to the jurisdiction of the Court was interposed. Judge Thayer held, that " by section 9 of the Judiciary Act of 1789, United " States District Courts were given jurisdiction ' of " all suits for penalties and forfeitures incurred " under the laws of the United States.' This " clause has ever since continued in force and re- " appears in the Revised Statutes of the United " States as Subdivision 3 of Section 563. Statutes " to recover penalties imposed by the laws of the " United States must accordingly be brought in " the United States District Court, unless jurisdic- " tion to recover the particular penalty is vested " in the Circuit Courts by the statute imposing the " penalty. *It is claimed by the plaintiff's attor- " ney that jurisdiction of suits, to recover penal- " ties imposed by section 4963 is vested in " the United States Circuit Courts by the " ninth clause of section 629, Rev. St. " U. S., which gives that jurisdiction of all suits " at law or in equity, arising under the patent " and copyright laws of the United States. If " the claim was based solely on the phraseology of " the ninth clause of Section 629, we should be dis- " posed to overrule it, and to hold that the suits " therein referred to, and over which the Circuit " Court is given jurisdiction, are ordinary civil " suits at law and in equity, to recover damages for " and to restrain infringements of patents and " copyrights and that the clause does not confer*

"*jurisdiction upon this Court over suits of a penal* "*character; that is, of suits brought to recover* "*penalties imposed by the patent and copyright* "*laws*" (italics ours).

Judge Thayer, however, held that it was to be inferred that the revisors in drafting the ninth clause of Section 629 did not intend to disturb the jurisdiction over certain penal actions vested, by the Act of 1870, in the Circuit Courts (16 St. at Large, 206, 215).

This reasoning we submit, with great respect, is fallacious. Prior to the Act of 1870, the general language vesting jurisdiction in the Circuit Courts over all actions, suits, controversies and cases at law or in equity arising under the patent or copyright laws of the United States, was held not to confer jurisdiction over actions to recover penalties, and when in the revised statutes the jurisdiction of Circuit Courts was restated in language substantially similar, the same construction must be given to said language. Had the revisors intended to incorporate the provisions of 1870 in the revision of 1874, they would have done so in express language and not resorted to words which had received a construction that did not include jurisdiction over actions for penalties.

But for the act of 1870 Judge Thayer manifestly would have held that the general language vesting jurisdiction in the Circuit Courts of actions at law or in equity arising under the patent or copyright laws of the United States, did not include actions to recover penalties.

An elementary rule of statutory construction is that the words of an act will receive the same construction the Courts have given to similar words in a prior enactment. This rule is especially applicable in this case because the revisors must have been aware of the construction which the Federal Courts had given to the provision vesting jurisdic-

tion in the District Court of actions to recover penalties and forfeitures.

Another rule of statutory constructions which clashes with Judge Thayer's conclusion is, that a *special* law giving the District Courts express and specific jurisdiction over *all* actions to recover penalties and forfeitures under *any* of the laws of the United States, is not superseded or affected by the *general* act giving the Circuit Courts general jurisdiction of suits at law or in equity in patent and copyright cases.

We doubt that Mr. Daly's counsel would have commenced this action in the Circuit Court had he not, as he stated in his affidavit on the motion for a new trial, believed that it was for damages (p. 86, fol. 197).

Of course this objection which goes to the jurisdiction of the Court, can be taken any time and renders the judgment *coram non judice.*

Colorado Co. *vs.* Turk, 150 U. S., 138.
Elder *vs.* Richmond Co., 19 U. S. App., 118.

II.

The statute being penal in its nature, must be strictly construed. Accordingly, the penalty is incurred only when substantially the whole of a copyrighted play is produced—and not when merely a single incident in one of the acts is represented.

Had the appeal taken to this Court in the equity suit not been dismissed for irregularity in the manner in which it was brought here, and had there been a review upon the merits, we ven-

ture to believe that it would not have been held by this Court, that the mere incident of a rescue by a third person, instead of the imperilled person saving himself, is of itself the subject of copyright.

Curtis on Copyright, 11.
Chatterton *vs.* Cave, 2 L. R. C. P. Div., 42; on Appeal 3 L. R., Appeal Cases, 483.
Haufstaengen *vs.* Empire Palace (No. 1), 7 Rep., 375;
Haufstaegen *vs.* Empire Palace (No. 2), 2 *Id.*, 385.
Hollinrake *vs.* Transwell, *Id.*, 568.
Paige *vs.* Widen, 20 L. T. N. S., 435.
Cable *vs.* Marks, 42 *Id.* (Chan. Div.), 432.
Perris *vs.* Heximer, 99 U. S,, 674.
Higgins *vs.* Keuffen, 140 *Id.*, 428.
Stowe *vs.* Thomas, 2 Wall. Jr., 547.
Martinetti *vs.* Maguire, 1 Abb. U. S., 536.
Freleigh *vs.* Thompson, First Cir. East. Div., N. Y., rept'd; 2 Morgans' Law of Literature, 319.
Ehret *vs.* Pierce, 10 Fed. Rep., 553.
Serrano *vs.* Jefferson, 33 *Id.*, 265.
Griggs *vs.* Perrin, 49 *Id.*, 15.
Fuller *vs.* Bemis, 50 *Id.*, 926.

But even if the incident can be protected in equity it does not follow that the party using it incurs the penalty fixed by the statute for violating a copyrighted book or play. The play which was copyrighted was Daly's dramatic composition entitled "Under the Gas Light, a Romantic "Panorama of the Streets and Homes of New "York," in five acts (p. 37, fol. 65). In the third scene of the fourth act of said play a miniature train of cars crosses the stage and one of

the characters, in danger of his life from the passing train, is rescued from such danger by another person. *The defendant's play, "After Dark," is in every respect dissimilar in characters, plot, dialogue and scenes*, excepting that in one of the acts there is likewise a scene in which one of the characters, in danger of his life from a passing train, is rescued by another character in the play. It was decided by the Court below that the railroad scene was not original with Daly; nor the passing of trains across the stage, nor the placing of a character in a dangerous position before such passing train, but only the single incident of his rescue from such danger by another.

When the defendant performed the play with the imperilled character staggering from the railroad track without the assistance of a "rescuer" it was held to be no infringement (p. 173 of Record, Daly *vs.* Webster, 4 C. C. A., 10).

The mere incident of a "rescuer" aiding the imperilled person was accordingly enjoined, but it does not follow from this that the defendant is liable at law for the penalties of the statute. The statute is as follows:

"Any person, publicly *performing or representing any dramatic composition* for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns shall be liable for damages therefor, *such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance as to the Court shall appear to be just.*"

The learned trial Judge held, that the statute is a penal one under which the plaintiff was entitled to recover *the penalty* of one hundred dollars for the first and fifty dollars for each subsequent performance, *without regard to the actual damage sustained by him.* He found as a fact that the plaintiff

had received license fees for the production of the said *railroad scene* prior to the said infringements by the defendant, which were not uniform; that they diminished as the play, in process of time, became more familiar to the public and that *ten dollars* was the smallest recent fee that had been paid for its performance and was a reasonable royalty to pay for its use (18).

Indeed the evidence falls short of showing that the railroad scene in Daly's play ever had a definite value in and of itself (166–171).

See Rude *vs.* Westcott, 130 U. S., 153.
Cornelly *vs.* Marckwald, 32 Fed. Rep. 292; affd. 131 U. S., 159.
Warren *vs.* Keep, 155 *Id.* 265–268.
Dobson *vs.* Dorman, 118 *Id.*, 10–17.

On the contrary, when it was transplanted in "Under Currents" the play proved a financial failure (p. 168.)

But, notwithstanding the finding that for the *entire* railroad scene, ten dollars would be a reasonable royalty, the Court found itself obliged to allow for the incident of the rescue one hundred dollars for the first and fifty dollars for each subsequent performance, because the statute was penal in its nature (30–32). After that decision was rendered, Mr. Justice Shiras of this Court reached the same conclusion.

Wheeler *vs.* Cobbey, 70 Fed. Rep., 487.

See also

Lyman *vs.* Boston & A. R. Co., *Id.*, 409.
Merchants' Bank *vs.* Bliss, 35 N. Y., 412.
Stokes *vs.* Stickney, 96 *Id.*, 326.
Gadseten *vs.* Woodward, 103 *Id.*, 242.

(*b.*) A penal statute must be strictly construed

against the prosecutor, but liberally in favor of the party prosecuted.

Whitaker *vs.* Masterson, 106 N. Y., 277–280.

It provides that the penalty shall be incurred only when the representation of a "*dramatic composition*" *is given. Can this, by judicial construction, be strained to include the representation of an entirely different play, in which there is no similarity of characters, plot, dialogue or scenes, excepting that there is reproduced in one of the scenes the single incident of the rescue in a manner similar to the rescue found in plaintiff's play?* Can the Court interpolate into the statute after the words "dramatic composition" the words, "or any part thereof, or any scene or incident in any scene in the said dramatic composition"?

An almost identical question was passed on by Mr. Justice Curtis in Rogers *vs.* Jewett, 12 Monthly Law Rep., N. S., 393, which was an action for a penalty under the sixth section of the Copyright Act of 1831. The learned Judge said:

> "This is an action of debt for penalties
> "founded on the sixth section of the Copy-
> "right Act of February 3, 1831. The declara-
> "tion, which is demurred to, alleges, in sub-
> "stance, that the plaintiff, having an exclu-
> "sive right to print and publish a certain book,
> "the defendants have printed and published a
> "book *whereof a large part is copied from*
> "*said book of the plaintiff*, and is an infringe-
> "ment of the copyright thereof."
>
> "The question raised by the demurrer is
> "whether the statute penalty is incurred by
> "printing *so much of a book as to amount to*
> "*an infringement of its copyright.*
>
> "The sixth section of the act is as follows:

"That 'if any person or persons from and "after the recording the title of any book or "books according to this act shall, within the "term or terms herein limited, print, publish "or import, or cause to be printed, published "or imported, any copy of such book or books "without the consent of the persons legally "entitled to the copyright thereof, first had "and obtained in writing, signed in the "presence of two or more credible witnesses, "or shall, knowing the same to be so printed "or imported, publish, sell or expose to sale, "any copy of such book, without such consent "in writing; then such offender shall forfeit "every copy of such book to the person legally, "at the time, entitled to the copyright thereof; "and shall also forfeit and pay fifty cents for "every such sheet which may be found in his "possession, either printed or printing, pub- "lished, imported or exposed to sale contrary "to the intent of this act, the one moiety "thereof to such legal owner of the copyright "as aforesaid, and the other to the use of the "United States, to be recovered by action of "debt in any Court having competent juris- "diction thereof.'

"The question depends on the meaning of "the words 'shall print,' &c., 'any copy of "'such book or books.'

"What Lord Mansfield said in Mellen *vs.* "Taylor, 4 Burr, 2311, was the technical mean- "ing of the word copy, viz., the incorporeal "right to the sole printing and publishing "cannot have been the sense in which that "word copy is here used. It means transcript; "and the only doubt is whether the thing "complained of must be a transcript of the "entire book, or whether the penalty is in-

" curred by printing of so much of it as " amounts to an infringement of its copyright.

" The words 'a copy of a book' naturally " import a transcript or copy of the entire " book.

" By the fourth section of this act, the ap- " plicant for a copyright of a book must de- " liver to the clerk of the District Court, 'a " 'copy of the same.' No one would suppose " this condition complied with by a delivery of " a copy of less than the entire book; and it " would hardly consist with that principle " which requires penal laws to be construed " strictly, if I were to hold that the words 'a " 'copy of a book' meant only a copy of the " entire book in the fourth section, which con- " fers a privalege, and meant not only this, but " also a copy of any such part of a book as " would infringe its copyright in the sixth sec- " tion, which inflicts a penalty.

" *To construe the act as the plaintiff claims* " *it should be construed would be, in effect, to* " *insert in it, after the words 'copy of a book,'* " *the very important addition, 'or any sub-* " *'stantial and material part thereof suf-* " *'ficient to infringe its copyright.' This* " *enlargement of a highly penal law, so as to* " *extend it to a large class of cases not de-* " *scribed in it, is inconsistent with the sound-* " *est principles of interpretation.*

" *I am not only unable to say that Congress* " *did intend to inflict these penalties on the* " *unlawful publication of parts of a copy-* " *righted book, because they have failed to say* " *so; but I think it clearly appears, from a* " *comparison of the act of May 31, 1790, with* " *the provisions of this act, by which it has* " *been revised and repealed, that Congress* " *did not intend to inflict these penalties upon*

" *the unlawful printiny or publication of less*
" *than an entire book.*

" The second section of the Act of 1790 pro-
" vided for penalties for the printing, &c., of
" any copy or copies of any map, chart, book
" or books, without the consent of the pro-
" prietor. Maps, charts and books are here
" all included in the same section and subject
" to the same provisions.

" When this act was revised and repealed by
" the Act of 1831, the provisions of its second
" section are divided and changed.

" The unlawful printing of books is pro-
" hibited under penalties by this sixth section,
" now under examination.

" The unlawful making of maps, charts, en-
" gravings, prints and musical compositions is
" prohibited under other penalties by the
" seventh section.

" The sixth section, in describing the offense,
" uses the language of the act of 1791, ' print,'
" &c,, ' any copy of such book or books ;' the
" seventh section materially changes this ; its
" language is, ' engrave, etch or work, &c.,
" ' either on the whole, or by varying, adding
" ' to or diminishing the main design, with in-
" ' tent to evade the law ; or shall print,' &c.,
" ' any such map.' &c., or ' any parts thereof.'

" This makes it plain that, in enacting this
" law, Congress did intend to inflict penalties
" on any such piracy of the copyright of a
" map, chart or engraving, as would amount
" to an infringement of the copyright ; and, so
" intending, that the appropriate language
" was used to express the intent. In the pre-
" ceding section, touching books, all such lan-
" guage being omitted, the inference is obvious
" and strong, that it was not intended to in-

"clude cases of copying parts of a book, but "only the republication of the whole.

"It was argued that this construction would "render the law of little utility, because it "would be easy to omit some unimportant "parts, and thus escape. Whether such omis- "sion would evade this law, I am not called "on to decide. If it did, literary property "would be better protected than the rights of "inventors; for they can only have their pri- "vate remedies at law and in equity, if their "inventions are substantially copied. And "authors have not only these private remedies, "but they who attempt to offer to the public "reprints of their works are subjected to severe "penalties. Whether these penalties should "be imposed on those who offer some parts of "their books to the public is for the legisla- "ture to determine.

"As to maps, charts, engravings, prints and "musical compositions, the Legislature has "thought proper to have the penalties applied "to any unlawful copy of such work made "with design to evade the law. But no such "intention is manifested in regard to unlaw- "ful copies of parts of books.

"So far as I know, the question arising in "this case has not been authoritatively de- "nied.

"It was raised in the Circuit Court in the "case of Backus *vs.* Gould, 7 How., 798, and "was ruled *pro forma* by the Circuit Court of "New York. But the Supreme Court did not "have occasion to pass upon it, that case hav- "ing been decided on another ground" (italics ours).

This Court, in Sparf *vs.* United States, 156 U. S., at p. 74, referred to the Justice who wrote that

opinion as "that eminent jurist, whose retirement from judicial station has never ceased to be a matter of deep regret to the bench and bar of this country."

That is the only case in which the question, so far as we have been able to discover, has been patly presented, and while it relates to a "book" manifestly the same rule should be applied to a dramatic composition. Indeed, in the statute a dramatic composition is included in the generic term "book"

Thus Section 4962 provides that no person shall "maintain an action for the infringement of his "copyright unless he shall give notice thereof by "inserting in the several copies of every edition "published on the title page, or the page im- "mediately following, if it be a *book*, or if a map, "chart, musical composition, print, cut, engraving "photograph, painting, drawing, chromo, statue, "statuary or model or design intended to be per- "fected and completed as a work of the fine arts, by "inscribing upon some portions of the face or front "thereof, or on the face of the substance on which "the same shall be mounted, the following words: "'Entered according to Act of Congress, &c.'"

In U. S. *vs.* Trans-Missouri Freight Asso., 116 U. S., 290, the statute prohibiting the making of a contract in restraint of trade, being under review this Court held that it includes every contract whether in reasonable or unreasonable restraint of trade. The Court said it had no power to restrict or enlarge the unambiguous language used by Congress; that if it be advisable to permit contracts in reasonable restraint of trade, that argument should be addressed to the legislative branch of the government. So here; the act is clear in imposing a penalty only when a dramatic composition is performed. If it be desired to impose the same extreme penalty, when only a single incident is rep-

resented, the appeal should be made to Congress. To read the statute as though the words "or any part thereof" followed the words "dramatic composition" would not be construing the law, but in, the language of Justice Curtis, would be judicial legislation,

In this case, the plaintiff asks the Court to construe the statute with even greater looseness than the English statute has been construed. The English law imposes a penalty of "not less than forty shillings" for the representation of a dramatic composition *or any part thereof* (3 and 4 Will., IV, C. 15, § 2), but the words, "or any part thereof," have been construed to mean *a substantial and material part* of the play (Chatterton *vs.* Cave, 3 Appeal Cases, 489). In the case at bar, not a syllable of evidence was introduced that the *manner of the rescue* is a material or important part of plaintiff's play; the evidence related to the value of the *entire railroad scene.* To state the proposition differently there is not a word of proof that the railroad scene could not be just as effectively performed if the character, who is in danger of his life, saves himself by staggering off the track or falling against the switch and side-tracking the train, or in some other way, that does not require the presence or assistance of another person. The defendant used a "rescuer" only after Judges Wallace and Coxe decided that Daly's copyright was invalid.

(*c.*) In the Court below, Daly's counsel argued, and the Circuit Court of Appeals held, that said incident of the rescue is a "dramatic composition." As we understand counsel's contention it is that a book may contain several independent or connected dramatic compositions and that the railroad scene is a dramatic compostion in and of itself.

We submit that the railroad incident without the

play is not a "dramatic composition" within the meaning of the statute ; and the mere incident of pushing or lifting a character from a railroad track, is certainly not.

See Martinetti *vs.* Maguire,
Haufstaeugen *vs.* Empire Palace,
Chatterton *vs.* Cave,
Hollinrake *vs.* Transwell,
Paige *vs.* Widen,
Fuller *vs.* Bemis,
Freely *vs.* Thompson,
Baker *vs.* Seldin,
Perris *vs.* Heximer, cited above.

The Court below held that the equity suit determined that the railroad scene was a dramatic composition (page 176), and counsel argued, that in this the decision followed the decision in Daly *vs.* Palmer (6 Blatch, 256 ; S. C. 36 How. Pr., 206).

In the equity case, as in Daly *vs.* Palmer, the question was simply whether equity would enjoin the infringement of a scene, which was a part of Daly's copyrighted book or play.

The Court said in the Palmer case :

> " Under the Act of 1856, construed in connec-
> " tion with the Act of 1831, he (the proprietor
> " of the copyright) is entitled to be protected
> " against piracy in whole or in part, by rep-
> " resentation as well as by printing, publish-
> " ing and vending. Although the Act of
> " 1831, in regard to printing, publishing and
> " vending, uses the words, 'in whole or in
> " part,' and the Act of 1856, in regard to
> " representing, does not use those words, yet
> " the Act of 1856, by referring, as it does, to
> " the right conferred by the Act of 1831, is the
> " 'sole right to print and publish' the copy-
> " righted composition, when such right is on

"the face of the Act of 1831, the sole right "print and publish 'in whole or in part,' and "by then conferring 'the sole right also to "act, perform or represent the same, or to "cause it to be acted, performed or repre- "sented on any stage or public place,' must "be held to confer the right to represent in "whole or in part."

In this connection it should be remembered that in the Palmer case the entire railroad scene was enjoined, whereas in the equity suit against Brady it was held that nothing was original with Daly but the incident of the rescue by another character.

In equity it is sufficient to show the taking of a part of copyrighted work without authority, but it by no means follows that such an infringer is liable for the penalty imposed for the wrongful representation of the entire play. Had the defendant taken the title of Daly's play and used it for another and different play, equity would unquestionably have enjoined him from so doing, but he would not be liable for the penalty under this statute.

Judge CURTIS, in the Rogers case (*supra*), answering the argument that such a construction would help a person to evade the law, said:

"It was argued that this construction would render the law of little utility, because it would be easy to omit some unimportant parts and thus escape. Whether such omission would evade this law, I am not called on to decide. If it did, literary property would be better protected than the rights of inventors; for they can only have their private remedies at law and in equity, if their inventions are substantially copies. *And authors have not only these private remedies*, but they who attempt to offer to the public reprints of their works, are subjected to severe penalties.

Whether these penalites should be imposed on those who offer some parts of their works to the public, is for the Legislature to determine" (italics ours).

Counsel's argument that if several dramatic compositions were copyrighted as one book, under our contention the penalties could not be enforced unless all the dramatic compositions in said book were performed begs the question. If any one of the dramatic compositions were performed in its entirety there would be little difficulty in holding that a copyrighted dramatic composition was infringed on and that the penalties were incurred.

Again, the railroad scene is not what Daly copyrighted. He copyrighted a play in five acts, to which he affixed the title of, "Under the Gas-Light, a romantic panorama of the Homes and Streets of New York." The statute renders a party liable who publicly performs and represents without authority that dramatic composition.

If counsels contention be correct Daly can recover these extremely heavy penalties under said statute for the use of merely the incident of the rescue, while if the action had been brought to recover damages or profits, he could recover only such as were earned from the use of said incident.

Warren *vs.* Keep, 155 U. S., 265-268.
Dobson *vs.* Dornan, 118 Id., 10-17.

III.

The Court below erred in permitting the defendant's answer in the equity suit to be used against him in this action.

(*a.*) It is only fair to repeat that in our opinion

this ruling would not, in all probability have been made but for the contention of plaintiff's counsel during the first trial that this action was for damages, and that the rules of evidence applicable to a common law action for damages and not those applicable to an action for penalties should be applied. He alleged in his affidavit upon the motion for a new trial that " he believed that this action was an action for damages, and could be sustained without reference to the clause in the statute which was alleged to be penal in its nature," and that " the decision of the Court (upon the first trial) has taken him by surprise " (96).

Upon that theory he introduced in evidence on the first trial the defendant's answer, Master's report and the decree, and urged that all evidence on the part of the defendant touching plaintiff's copyright or the infringement be ruled out as *res adjudicata* (35-63-70-77). When, after the submission of briefs and an examination of the law, the learned trial Judge decided that the action could not be sustained as an action for damages, but only as an action to recover penalties it clearly became error to admit in evidence the verified answer of the defendant in the equity suit.

Section 860 of the U. S. R. S. provides that " *no pleading of a party, nor any discovery of evidence obtained by means of a judicial proceeding in this or any foreign country, shall be given in evidence or in any manner used against him or his property or estate in any Court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture*, provided that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The use of the pleading in evidence or *in any*

manner in an action "for the enforcement of any penalty is thus plainly prohibited." Nothing can be broader, no language more expressive, and yet the defendant's answer in the equity suit was read in evidence against him in this action (Plaintiff's Exhibit 1B, 43). It had to be verified (see Amendment to Bill of Exceptions, p. 166), as the complainant refused to waive the oath (42). When the record including the said answer was offered, objection was taken (35); again when plaintiff rested (62) and at the close of the case (77). It was again urged by exceptions to the findings (147) and assigned as error (153-154).

In Boyd *vs.* The United States, 116 U. S., 616, this Court said, at p. 634:

> "The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between civil and criminal proceedings on the same statutes in such cases, we may refer to the recent case of Coffey *vs.* The United States (*ante*, 436), in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising from the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are, further, of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a

witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment." * * * and at page 631 :

"Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englisman ; it is abhorrent to the instincts of an American. It may suit the purposes of a despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

Lees *vs.* United States, 150 U. S., 476.

(*b.*) Counsel argued below that the error is not sufficiently presented by the objection. It was presented in every possible form that we could conceive of, and at every stage of the case. *The answer was not offered in evidence separately*, but the entire record in the equity suit was introduced. We thereupon enumerated eight grounds of objection not only specifically that this record could not be used against the defendant in this penal action, but cited authorities to enforce the objection. The court was thus placed in possession of the grounds of our objection (pages 35–36 of record). The objections were again stated when the plaintiff rested (62); and were repeated when defendant rested (77–78). We were likewise explicit in our assignments of error (153–154), and the decision of Judge Shipman on the first trial, when he dismissed the complaint, shows that he clearly understood defendant's position and that the objections were specific enough to inform him of the defendant's contention.

We could not specifically object to the answer because it was not offered in evidence separately, but came in with the record. The record itself was marked "Plaintiff's Exhibit 1," and the different papers constituting the record were marked "Plaintiff's Exhibit 1, a, b, c, etc., for the purpose of convenience. There was no occasion or propriety in raising a separate objection to each paper constituting the record. Both Court and counsel fully understood that the objections to this record included the defendant's answer. The Court of Appeals manifestly ignored the contention that the objection was not sufficiently specific.

(*c.*) Counsel also argued below that this error could not be urged because Brady, in his answer refers to the complaint, final decree and record in the equity suit. Where a defendant after denying the charge made against him sets up affirmative defences based upon a record, there is no rule of law that ma*kes* the record, otherwise incompetent, competent proof of the facts therein contained and sufficient to sustain a conviction in a criminal case. The defendant in a criminal proceeding has a right to base his plea upon a prior trial, conviction or acquittal, but the prosecution cannot *for that reason* claim the right to introduce said record to prove the case against the defendant. The error committed by the Court was brought on by the contention of counsel that the action was at law for damages, and on the first trial said record was admitted on that theory.

Again, the action being at law, the New York State rule as to the form of pleadings prevails. Under the New York practice, inconsistent defenses may be set up.

Societa Italiana *vs.* Sulzer, 138 N. Y., 468.

Goodwin *vs.* Wertheimer, 99 *id.*, 149.

Bruce *vs.* Burr, 67 *id.*, 237.

If, therefore, we were to assume that the affirmative defenses set up in Brady's answer, in which reference is made to the equity decree, are inconsistent with the denials therein contained, Brady cannot be prejudiced thereby, or compelled to elect between his denials and his affirmative defenses. These affirmative defenses were:

(*a.*) That the performances claimed to have been in violation of Daly's rights were not "willful," but given intermediate the decision of Judge Wallace and the reversal by the Court of Appeals; and

(*b.*) That Daly made an election to sue for profits when he filed his equity bill, which was a bar to this action.

It is not inconsistent to contend that the plaintiff has no copyright, and further that the defendant did not willfully violate it, and that plaintiff made an election which bars the action. But even if inconsistent, still under the New York system of pleading, Brady had a right to set up these defenses, and is not to be prejudiced thereby, or driven to make an election which will compel him to waive one or the other of his defenses.

(*d.*) The learned Court below held that there was no harmful error in the admission of said answer, in view of the fact that the record was admitted for certain purposes only, and of the statement of the Circuit Judge that the answer was not used or taken in evidence, in ascertaining any facts as to performance or for the enforcement of any alleged liability in this action (176-177). If the answer were stricken out there would be no basis for the decree in equity on the strength of which the Court excluded Brady's evidence as being barred by the decree (63, 70, 77). Indeed, Daly's case rests wholly upon the record in the equity suit founded upon that answer. With the

exception of his deposition as to royalties received by him, he introduced no other evidence (166-171).

Here was an answer, under oath, which, under the protection of the statute Brady could safely file, *given in evidence in connection with a decree secured in the suit in which it was served.*

The decree founded upon that answer was used in this action to bar the defendant from introducing evidence which would have enabled him to present the questions raised by his answer in this action.

(*e.*) It is argued that said answer did not admit the giving of the infringing performances. The answer *did make admissions*—it admitted defendant's connection with the company which gave the infringing performances. It was charged in the bill that Brady and his co-defendant Webster, with full knowledge of Daly's rights, had been giving infringing performances of "After Dark," in which one of the characters was suspended from an aperture in the top of a tunnel, hanging over the rail where he would be struck by the engine, and is rescued by another character. These performances were stated to have been given in the city of Philadelphia, State of Pennsylvania, at the National Theatre, and that Brady and Webster intended to produce the said play "After Dark," in the city of New York, at the People's Theatre (see Bill of Complaint, Plaintiff's Exhibit 1*a*, pp. 40-41).

In his answer Brady *was obliged to admit his connection with the play, and that he gave the performances at the National Theatre, and that he intended to produce the play at the People's Theatre in the city of New York* (See Answer, Plaintiff's Exhibit 1b, page 43; paragraph 13, p. 48; paragraph 11, p. 47, of Record).

This admission became an important link

in the chain of evidence against Brady, and was made the most of by Daly's counsel. In his brief in the Court of Appeals he refers to the performances in Philadelphia, and the change made in the railroad scene in New York City and argued: "On the 19th day of May, 1889, "the bill in this suit was sworn to by the "complainant, alleging that the scene of the "play of 'After Dark,' as produced by the "defendants, was a colorable imitation of the "scene from 'Under the Gas Light,' and men- "tioning the difference, that Gordon Chumley was "suspended a few inches from the track, by a "rope, instead of being laid, bound upon the "track. The defendants' answer admitted that "the production in Philadelphia was, as it has "been shown to be, but said that the production "of the play in the city of New York varied, as "Gordon Chumley, instead of being rescued from "the track, reels up against the switch and throws "the train off upon another line. * * * It is "perfectly, plain, then that the defendants have "produced and, except so far as they have feared "the orders of the Court, have intended and con- "tinued to produce the play of 'After Dark' pre- "cisely as it was originally written."

Daly's Brief, Circuit Court of Appeals in the Equity suit, pages 27 and 28.

And on said admission the Court of Appeals largely based its decision in favor of the injunction, saying:

"The performances of defendant's play, with "the scene unchanged (although such per- "formances were had after the suit was begun) "*and the performances in Philadelphia be-* "*fore suit*, with the immaterial change above "referred to, of suspending the imperilled per-

"son above the track, sufficiently indicate the "intention on the part of the defendants to "infringe complainant's copyright, unless re- "strained by decree of the Court" (italics ours).

Daly *vs.* Webster, 56 Fed. Rept., 483.

(*f.*) Counsel finally contended in the Court below, that the defendant was not obliged to answer the bill under oath, as he might have demurred. The bill was not demurrable. It was properly framed in equity and the statute protected the defendant against the use of his answer in a penal action. Besides it does not lie in the mouth of the plaintiff, after calling upon the defendant for a verified answer, to urge that he should have demurred to the bill.

IV.

It was error to admit in evidence the record in the equity suit, as proof of the material allegations of the complaint, and to hold that it was res judicata, precluding defendant from introducing evidence that the railroad scene and the manner of the rescue were public property and not original with the plaintiff.

(*a.*) While the equity decree would, perhaps, be conclusive in an action at law, it cannot have such operation in a criminal suit or on a *quasi* criminal action to recover a penalty.

1 Freeman on Judgments, Section 259.

In a suit in equity, the evidence to sustain the decree need only be sufficient to satisfy the conscience of the Court by a bare preponderance,

and the defendant may be compelled to testify and produce his books and papers, and his omission to do so raises a strong presumption against him. In a penal action, however, the plaintiff must make out his case by proof beyond a reasonable doubt, and not only cannot the defendant be compelled to testify and produce his books and papers, but his omission so to do does *not* raise a presumption against him.

"To recover penalties a case must be made out *beyond a reasonable doubt.*" (*Italics ours.*)

Chaffee *vs.* United States, 18 Wallace, 516.

> "If the scale of evidence does not preponderate against him (defendant), if it hang upon a balance the penalty cannot be enforced. No individual should be punished for a violation of law *which inflicts a forfeiture of property, unless the offense shall be established beyond a reasonable doubt.*" (Italics ours.)
>
> United States *vs.* Burdett, 9 Pet., 682.

The statute under discussion (4966) was amended January 6th, 1897, by providing that *in addition to a money penalty* "if the unlawful performance and representation be wilful and for profit, such person or persons shall be guilty of a misdemeanor and upon conviction, be imprisoned for a period not exceeding one year."

Surely on an indictment it could not be contended that a case would be made out by the introduction of a decree in equity, and that it would be *res adjudicata* and bar the defendant out of all defenses. Yet in this quasi-criminal proceeding to recover penalities defendant was convicted and fined to the extent of $6,300 upon substantially such proof.

In Boyd *vs.* United States (*supra*) a statute similar to the one under discussion as amended, pro-

vided for imprisonment and a penalty. Referring to those provisions the Supreme Court said:

> "If the government prosecutor elects to waive an indictment, and to file a civil information against claimants—that is, civil form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of Coffey *vs.* The United States, *ante* 436; in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts."

"An action to recover a penalty or forfeiture though in form a civil action is unquestionably criminal in its nature" (*Syllabus*).

See also Lees *vs.* N. Y., 150 U. S., 476.

A penalty is in the nature of a punishment for the non-performance of an act, or for the performance of an unlawful act, and involves the idea of punishment whether enforced in a civil or criminal action or procedure.

Hall *vs.* Norfolk and Western Co., 41 L. R. A., 669.

In Stowe *vs.* United States, 167 U. S., 178, it appeared that the defendant was indicted criminally for cutting timber from land owned by the government and was acquitted; thereupon the govern-

ment brought an action to recover the value of the timber alleged to have been unlawfully cut by Stowe from its land. He sought to introduce in evidence the record of the criminal proceeding, but this Court said (page 184):

> "In our opinion, the record of the criminal "proceeding in the Court of Idaho *was not* "*evidence to establish or disprove any of the* "*material facts involved in the civil action.*" * * *

The Court, at page 188, says:

> "In the criminal case the Government sought "to punish a criminal offense, while in the civil "case it only seeks, in its capacity as owner of "property illegally converted, to recover its "value. In the criminal case his acquittal "may have been due to the fact that the Gov- "ernment failed to show beyond a reasonable "doubt the existence of some fact essential to "establish the offense charged, while the same "evidence in a civil action, brought to recover "the value of the property illegally converted, "might have been sufficient to entitle the Gov- "ernment to a verdict." * * *

So here in the civil suit, the plaintiff could resort to the defendant's answer under oath, and could also compel his attendance with books and papers, and would be entitled to his decree, if, from the record, he made out a case by a preponderance of evidence, but in this action, "unquestionably criminal in its nature," plaintiff was required to make out his case beyond a reasonable doubt, by common law proof, without calling the defendant or for his books or papers, and with no presumption against him if he failed to testify.

(*b.*) If said record could be evidence at all, of

any of the facts which it was necessary for plaintiff to establish, it certainly was not *conclusive evidence*, so as to bar the defendant from attacking the validity of plaintiff's copyright, or showing that plaintiff was not the inventor of said incident of the "rescue."

Had the evidence offered by the defendant (68-70-77) been admitted, the lower Courts would very likely have followed the previous decision, but the defendant could have secured the benefit of a review by this Court, *which has never been committed to the view* that the mere incident of a rescue, such as the shoving or lifting of a person from a place of danger is of and in itself the subject of copyright monopoly, preventing its representations upon the stage, in any other play without the plaintiff's consent or its use in any story, book or magazine, without his permission.

A defendant may not have the means to defend a suit for an injunction. It would be a novel, and dangerous, doctrine that he has thereby estopped himself from defending himself in a criminal prosecution which may follow.

V.

The performances between the decisions of Judges Wallace and Coxe, holding the copyright invalid, and the reversal by the Court of Appeals were not willful violations of plaintiff's rights and for that reason the statutory penalty was not incurred.

The decision of Judge Wallace was rendered June 19th, 1889 (19); the bill was dismissed on final hearing by Judge Coxe, November 4th, 1891 (19); the Court of Appeals reversed the lower Court, October 4th, 1892 (19). As the performances in

question were given between August 24th, 1891, and October 5th, 1892 (18), it may, with perfect propriety, be said they had the sanction of the Court. Can they then be held to be willful violations of plaintiff's rights, rendering defendant guilty of a crime punishable by the forfeiture of his property. While a *prima facie* case may ordinarily be made out by mere proof of the unauthorized giving of performances, when it appears that they were given under the conditions disclosed in this record, it cannot be said that they were willful. Consequently no forfeiture or criminal punishment can follow, for the reason that the intent, an essential element of criminality, is wanting.

In Cutter *vs.* The State, 36 New Jersey Law, 193, where the defendant, charged with taking fees to which he was not entitled, urged that he did so under a mistake as to his legal rights. Chief Justice BEASELY said (on page 126):

> "On the part of the State it is argued that this statute is explicit in its terms, and makes the mere taking of an illegal fee a criminal act without regard to the intent of the recipient. Such undoubtedly is the literal force of the statute. But then, on the same principle, the officer would be guilty if he took by mistake or inadvertence more than the sum coming to him. Nor would the statutory terms, taken in their exact signification, exclude from their compass an officer who might be laboring under an insane delusion. Manifestly, therefore, the terms of this statute are subject to certain practical limitations. This is the case with most statutes couched in comprehensive terms, and especially with those that modify or otherwise regulate common law offenses. In such instances, the old and new laws are to be construed together, and the former will not be

considered abolished, except so far as the design to produce such effect appears to be clear. In morals, it is an evil mind which makes the offense, and this, as a general rule, has been at the root of the criminal law. The consequence is, that it is not to be intended that this principle is disregarded merely on account of the generality of statutory language. It is highly reasonable to presume that the lawmakers did not intend to disgrace or to punish a person who should do an act under the belief that it was lawful to do it; and it is this presumption that fully justifies the statement of Mr. Bishop 'that a statute will not generally make an act criminal, however broad may be its language, unless the offenders intent concurred with his act'" (Crim. Law, 80).

In Lusby *vs.* Kansas City M. & B. R. Co., 36 L. R. A., 510, it was held: That a party relying upon the decision of the Court of last resort in a State, cannot, although the decision is afterwards repudiated, be regarded as acting willfully or maliciously, within the meaning of a statute prescribing a penalty for willful trespass.

It is true that the statute under discussion does not expressly provide that the representation or performance must be "willful" but that is necessarily implied.

In an action to recover a penalty, the wrongful intent is a material ingredient of the offense. Though the Circuit Court on final hearing decided that it was no violation of Daly's copyright to give these performances, when that decision was reversed by the Court of Appeals, an injunction was properly issued. There having been an infringement, equity would not permit its continuance, no matter how innocent the intent, but

when it comes to punishing Brady by the infliction of penalties, the additional ingredient of a wrongful intent must be found, and when it appears that the performances complained of were given subsequent to a decision of the Court, holding that they were lawful, that element is missing.

In Harper *vs.* Shoffell, 26 Fed. Rep., 519, the question is passingly alluded to as follows: "The defendant has not *intentionally* infringed the plaintiff's rights, and, *therefore*, nominal damages only are claimed" (italics ours).

Even in a common law action, where *punitive* damages are sought, guilty intent must be shown.

Lake Shore, &c., Ry. Co., *vs.* Prentiss, 147 U. S., 101.

In that case the Court, at page 107, says:

> "In this Court the doctrine is well settled
> "that in actions of tort, the jury, in addition
> "to the sum awarded by way of compensation
> "for the plaintiff's injury, may award exem-
> "plary, punitive or vindictive damages, some-
> "times called smart money, if the defendant
> "has acted wantonly, or oppressively, or with
> "such malice as implies a spirit of mischief, or
> "criminal indifference to civil obligations.
> "*But such guilty intention on the part of the*
> "*defendant is required in order to charge*
> "*him with exemplary or punitive damages*"
> (italics ours).

The rule is clearly stated by Judge Coxe in Willing *vs.* Le Bau (35 Fed. Rep., 302):

> "In a suit for infringement of a patent where
> "the defense, though active and annoying to
> "complainant has not been in a legal sense
> "wanton or unjustifiable, *the defendant hav-*
> "*ing unquestionably considered himself in*

" *the right and having acted fairly and hon-*
" *estly toward his adversary*, a motion for the
" Court to increase the damages as it is al-
" lowed in its discretion to do under Rev.
" St. U. S. Secs. 4919, 4921, should not be
" granted " (Syllabus, italics ours).

Manifestly the application of the same rule is proper where, for the use of a single incident, a recovery is sought in an amount ten times greater for the first and five times greater for each subsequent performance than plaintiff received *for permitting the performance of his entire play* (166–171).

VI.

The Court erred in refusing to hold that the plaintiff, by first proceeding in equity for an accounting of profits, made an election barring him from a recovery for penalties.

The bill in equity prayed, among other things, that the "defendants be decreed to render a full and true account to your orator, of all moneys and profits received through or by reason of the said performances of the said play of 'After Dark' and of the railroad scene therein" (42). And the Court of Appeals "remanded the cause, with instructions to enter *the usual decree for an accounting and perpetual injunction*" (53). John E. Ward was thereafter appointed Master to take proof of the number of performances given by the defendants (54). Having thus elected to sue for the profits, Daly cannot when he finds that he can recover no profits turn the action into one for the recovery of the statutory penalties.

The soundness of this contention is emphasized

by the legislation relating to patents. Before the passage of the Act of 1870, the owner of a patent was restricted either to an accounting of profits, OR to damages. He could not recover both. That was also the rule in England. In De Vitre *vs.* Betts (6 House of Lords, 319), it was held that the complainant was *bound to elect* whether to prosecute for profits or damages, and *an election of one constituted a waiver of the other. That was also the rule in the United States until the amendment of 1870.*

Root *vs.* Railway Co., 105 U. S., 189, 209, 212.

But the right given to a patentee by that amendment (Sec. 53) to recover "in addition to profits the damages sustained," was not extended to the owner of a copyright.

In Stevens *vs.* Gladding (2 Curtis, 608), CURTIS, J., said:

> "*If the proprietor will waive his action for* "*damages, he may have an account of profits,* "upon the ground that the defendant has, by "dealing with his property, made gains which "equitably belong to the complainant. And "I perceive no sound reason for restricting "those gains to the difference between the "cost and the sale price of the map or book, "or limiting the right to an account to those "persons who have sold the work solely on "their own account. He who sells on commis-"sion does, in truth, sell on his own account, "so far as he is entitled to a percentage on the "amount of the sales. What he so receives is "the gross profit coming to him from the pro-"ceeds of the sales. And what he so receives "diminishes the net profits of the one who "employs him to sell. When the latter is

" called on to account, he has an allowance for " the commissions he had paid, because those " sums, though part of the gross profits of the " sales, he has not received. That part of the " profit of the sales being in the hands of the " commission merchant, the consignor is not " accountable for them. But why should not " the commission merchant, who has them, " *account for them? He was liable to an ac-* " *tion for damages for selling. That right is* " *waived.* I think he should pay over to the " proprietor, in lieu of damages, the gain he " has made from the sales. It does not seem to " me that the term profits necessarily, or when " construed in reference to the subject matter, " properly, had so restricted a meaning as to " exclude commissions received from the pro- " ceeds of the sales of the property of the com- " planant " (italics ours).

See also Morss *vs.* Knapp, 35 Fed. Rep., 218 (Circuit Court, Conn.).

As already stated, it is not of the slightest importance that there was no recovery of profits upon the accounting.

In Conrow *vs.* Little (115 N. Y., 387), the Court said :

" It is not at all material to the question that " the plaintiff discontinued the first suit before " bringing the present to trial, for it is the " fact that the plaintiffs elected this remedy " and acted affirmatively upon that election. " *That determines the present issue.* Taking " any step to enforce the contract was a con- " clusive election not to rescind it on account " of anything known at the time. After that " the option no longer existed, and it *is of no* " *consequence whether or not the plaintiff* " *made the choice effective* " (italics ours).

In Bach *vs.* Tuch (126 N. Y., 53), the plaintiffs having sold goods on credit induced by the fraudulent representations of the defendant, first commenced an action on contract to recover the purchase price, and nothing being recovered discontinued and brought an action *in tort* to recover possession of the goods; held that plaintiffs by their first action made an election which was final and irrevocable.

In the case at bar plaintiff made the election with full knowledge of the facts. Having the alternative to sue for an injunction *and* for profits down to the time of the entry of the decree, or sue for an injunction *only*, which would leave him free to sue for the statutory penalty he adopted the former remedy. He is bound by the election.

In Interlied *vs.* Whaley (85 Hun, 68) plaintiff proceeded in equity to enjoin defendant from depositing sawdust in a stream and obtained a decree for a perpetual injunction *without any damages*. Thereupon an action at law was commenced by him to recover the damages he sustained *after the commencement of the equity suit but before the final decree.* The Court carefully reviewing the authorities reached the conclusion concisely stated in the syllabus as follows:

> "The damages recoverable in an action at
> "law are limited to such as occurred prior to
> "the commencement thereof, but in an action
> "in equity, where the plaintiffs seek to obtain
> "a permanent injunction forbidding the com-
> "mission by the defendants of certain alleged
> "wrongful acts and trespasses, and allege
> "damages as incidental to the equity relief,
> "the plaintiffs are entitled, under a proper
> "state of facts, to recover all damages sus-
> "tained up to the time of the rendering of the
> "decision made in that action, upon which

"judgment was entered by reason of the "wrongful acts of the defendants.

"They are entitled to recover such damages "as would necessarily and naturally result "or be incurred from the injury complained "of.

"The judgment recovered in such action "would be a bar to the maintenance of an ac- "tion at law to recover damages sustained by "the plaintiffs since the making of the decree "in the prior action by reason of the alleged "wrongful acts of the defendants, if such acts "were done prior to the making of the decree "in the first action" see also Root *vs.* The Railway Co., 105 U. S., 187, at pp. 198-201).

It was manifestly in pursuance of the prayer in the bill, and the mandate of the Court of Appeals, "to enter the usual *decree for account*" (page 53), that the matter was sent to a master to take and state an account of the number of times the railway scene was used and produced by the defendant, and where each performance took place, and the terms and agreements under which it took place (54).

VII.

The Court below committed error in limiting the defendant upon the new trial to proof as to the number of performances.

With the utmost respect we venture to assert that no authority can be found justifying the order of the Trial Court granting the plaintiff a new trial. It seems to have been based upon the mere statement of counsel that he was mistaken in the nature of his action, had not properly prepared his case, and was, therefore, surprised at the result (85). He did not bring himself within the

rules governing the granting of new trials. His motion was not founded upon newly discovered evidence, and it is not pretended that there was a witness in Court, whom he failed to call, because of the ruling admitting the records in evidence. If error was committed at the first trial, *it was because the Court* was misled by counsel's contention that the action was for damages and not to recover penalties. The decision establishes a new and dangerous practice under which counsel may try a case upon one theory, and if defeated, get a second opportunity to try it upon a different theory. Such gambling should not be allowed, and is condemned by the authorities.

Palmer *vs.* Fisk, 2 Curtis, 14.
Codman *vs.* Vermont, &c., Co., 17 Blatch., 1 (see p. 3).
Carr *vs.* Gale, 1 Curtis, 384.
Aimes *vs.* Howard, 1 Sumner, 482 (Story, J., see p. 489).
Meeker *vs.* Wilson, 1 Gall., 419; see p. 426.
Fuller *vs.* Harris, 29 Fed. Rep., 814.
Smith *vs.* Rentz, 73 Hun, 195; see p. 197.
Van Tassel *vs.* N. Y. & C. R. Co., 1 Misc., 312, 313.
Chandler *vs.* Thompson, 30 Fed. Rep., 38; see p. 44.
Mary *vs.* DeWolf, 3 Woodb, & B., 193.
Whetmore *vs.* Murdock, *Id.*, 380.
Washburn *vs.* Gould, 3 Story, 122–157.
Witter *vs.* Soules, 32 Fed. Rep., 765.

But if the new trial had been granted on all the issues, the grievance would not have been as serious, as it became in consequence of

the direction in the order, *not to permit the defendant to interpose any defense*, excepting as " to the numbers and times of the representations, if any there were, of the play of ' After Dark ' by the defendant within two years prior to the commencement of this suit " (93). Accordingly, when defendant demanded a jury trial, it was refused, because of the said limitation (93). On the first trial which resulted in the dismissal of the complaint, plaintiff's procedure did not require the defendant to put in all his evidence, and on the new trial, he was not allowed under the order granting it to put it in. He did not introduce his evidence at the first trial because he was satisfied that as the record stood, the complaint would have to be dismissed. If after that, plaintiff was given another chance in the game, the defendant, in fairness, should have been given an equal chance and should not have been excluded from introducing evidence *upon every issue* raised by the pleadings. The defendant was thus, in effect, deprived of his constitutional right to a trial. That was error and assigned as such (156).

Counsel argued below that as no additional evidence was offered by Brady at the new trial, on any of the issues relative to plaintiff's copyright, or the infringement by defendant, the objection cannot be raised. None could have been given or offered, because the *order limited* the proof to the number of performances that were given by Brady, and he consequently had no right to give or offer any evidence excepting on that question.

Had Brady asked for a new trial the Court might perhaps have had the right to impose the condition that the proof should be thus limited, but having been successful on the first trial, he cannot be deprived of the fruits of his victory by the granting of a new trial, and tying him up in that way on said new trial.

VIII.

The trial Judge erred in permitting the plaintiff upon the new trial to present the evidence of the number of performances as it was obtained from the information given by the defendant under compulsion in the equity suit.

In that suit, the defendant under compulsion of a subpœna disclosed the times and places where "After Dark" was performed (see Master's Report, 55; finding 18). The objection was taken that defendant could not be thus compelled to disclose facts which might tend to criminate and subject him to a penalty was overruled (19), as were also the exceptions to the report of the Master under Callahan *vs.* Meyers, 128 U. S., 618, where the Court held (see Syllabus):

> "Although the bill prays for a forfeiture to "the plaintiff, under the statute, of copies in "in possession of the defendant of the in- "fringing volume, and for their delivery to "the plaintiff, yet, if the final decree does not "award any forfeiture, the defendant is not "injured by anything done under such pro- "vision of the interlocutory decree; nor can "the penalties given by Section 7 of the Act "of 1831 be enforced in a suit in equity; *nor "can evidence obtained from the defendant "through his examination, and the produc- "tion by him of his books and papers, be used "against him in any other suit in which a for- "feiture is sought*" (italics ours).

The same rule is laid down in other cases.

Johnson *vs.* Donaldson, 3 Fed. Rep., 22.

Chapman *vs.* Ferris, 12 Fed. Rep., 693.

Atterill *vs.* Ferrett, 2 Blatch., 39.

Though the trial Judge, in dismissing the complaint in this action on the first trial, held that defendant's testimony in the equity suit could not be used against him, it was thus indirectly used on the new trial. Instead of reading said testimony, counsel sent commissions to the places where the defendant had disclosed he had given performances, and in that way got in the facts disclosed by that testimony. This was error, as it deprived the defendant of the protection guaranteed him by the constitution. When he was subpœnaed before the Master, he was obliged to disclose, under the said constitutional guaranty that his evidence should not be used against him, the times when and the places where the performances were given, but to permit plaintiff to secure proof from those places, and use it against him would be as effectually using his evidence as though it were read at the trial against him.

To prevent just such a wrong Section 860 of the Revised Statutes provides that "no pleading of a party nor any *discovery of evidence obtained from a party or witness by means of a judicial proceeding* in this or any foreign country, shall be *given in evidence or in any manner used against him or his property or estate in any Court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture*, provided that this section shall not exempt any party or witness from prosecution or punishment for perjury committed in discovering or testifying as aforesaid."

The security thus granted to a witness, is not merely that his evidence shall not be read on the trial of an action for the recovery of a penalty but that it *shall not be used in any manner against him in such a proceeding.* In defiance of that provision, plaintiff was allowed to use said evidence

as the basis for obtaining and introducing in evidence the information procured therein. The protection secured to defendant that his evidence should *in no manner* be used against him was circumvented and frittered away.

Counselman *vs.* Hitchcock, 142 U. S., 547.

People *ex rel.* Taylor *vs.* Forbes, 143 N. Y., 219.

IX.

The judgment should be reversed, with costs, and the proceedings remitted to the Court below with instructions to dismiss the complaint, with costs.

All of which is respectfully submitted.

A. J. DITTENHOEFER,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

WILLIAM A. BRADY,
Plaintiff in Error,

against

AUGUSTIN DALY.

No. 273.

Brief in reply to supplemental brief of defendant in error.

The defendant in error has filed an answering brief and a supplemental brief. The only portion of his two briefs calling for a reply is his contention that the Circuit Court has jurisdiction of actions to recover penalties.

(*a.*) After citing some of the early statutes on the subject of copyright counsel asserts that out statement that

> " Prior to the Act of 1870 the general lan-
> " guage vesting the jurisdiction in the Circuit
> " Courts over all actions, suits, controversies
> " and cases at law or in equity, arising under
> " the patent or copyright laws of the United
> " States, was held not to confer jurisdiction
> " over actions to recover penalties,

is without authority, since the said general language was not employed to vest jurisdiction prior to the Act of 1870.

He has evidently overlooked the Act of 1819 (3 St. at large, page 481), which is not cited or referred to by him. That act provides:

> "That the Circuit Courts of the United States
> "shall have original cognizance, as well in
> "equity as at law, of all actions, suits, contro-
> "versies and cases arising under any law of
> "the United States, granting or confirming to
> "authors or inventors, the exclusive right to
> "their respective writings, inventions and
> "discoveries. * * * "

The substance of said act is incorporated in the Patent Act of 1836, so far as it relates to inventors (5 St. at large, 124).

It will be noticed that the language used by us and criticised by counsel is almost *verbatim* the language used in the Act of 1819.

In Stephens *vs.* Gladding, 17 How., 447, this Court, referring to the act above cited, says:

> "There is nothing in this Act of 1819, which
> "extends the equity powers of the Courts to
> "the adjudication of forfeitures; it being
> "manifestly intended that the jurisdiction
> "therein conferred should be the usual and
> "known jurisdiction exercised by Courts of
> "equity for the protection of analogous
> "rights." * * *

Drone in his work on Copyright, at page 548, says:

"The law as thus expounded by the Supreme "Court in 1854, has not been changed by any "statute since passed. The sections of the "copyright law, which impose forfeitures and "penalties, do not specify in what court they "shall be recovered. Section 529 of the Re-"vised Statutes gives to the Circuit Courts of "the United States original jurisdiction of all "suits at law or in equity, arising under the "copyright laws, and Section 4970 simply em-"powers Circuit Courts and District Courts "having jurisdiction of Circuit Courts, to "grant injunctions to prevent the violation of "copyright."

We thus find that the language of the Act of 1819 is in substance, as broad as that found in subdivision 9 of Section 629 of the Revised Statutes giving the Circuit Courts jurisdiction "of all suits at law or in equity arising under the patent or copyright laws of the United States."

(*b.*) Counsel lays stress upon the fact that the word "exclusive" in the Act of ~~1897~~ 1789 giving the District Court jurisdiction of actions for penalties and forfeitures incurred under the laws of the United States, is omitted from Section 563, Clause 3 of the Revised Statutes and argues that the Revisors omitted that word for the reason that they had vested in the Circuit Court jurisdiction over penalties in patent and copyright cases.

In Lees *vs.* U. S., 150 U. S., 476, this Court, at page 478, had occasion to speak of the omission of this word, saying:

"From the earliest history of the govern-

" ment, the jurisdiction over actions to recover
" penalties and forfeitures has been placed in
" the District Court. The ninth section
" of the Judiciary Act of September 24,
" 1789, 1 Stat., 73, 76, c. 20, provided as
" follows: 'The District Court shall have
" 'exclusive original cognizance * * *
" 'of all suits for penalties and forfeitures in-
" 'curred under the laws of the United States.'
" While in the Revised Statute the word 'ex
" clusive' was omitted, the language was not
" otherwise substantially changed. It is true
" that in some cases jurisdiction over matters
" of penalty and forfeiture has been committed
" to the Circuit Court, *but this was always*
" *done by special act and does not otherwise*
" *affect the proposition that the general juris-*
" *diction over actions for penalties and for-*
" *feitures has been and is vested in the Dis-*
" *trict Court.* Hence, when as here, a statute
" imposes a penalty and forfeiture, jurisdiction
" of an action. therefor would vest in the Dis-
" trict Court, unless it is in express terms
" placed exclusively elsewhere" (italics ours).

(*c.*) Counsel says that Lees *vs.* U. S., holds only that the jurisdiction of District Courts is not necessarily ousted when the right to recover a penalty is given to the Circuit Court. We do not so read that decision. In that case the Act imposed a penalty and provided that it may be recovered "as debts of like amount are now recovered in the Circuit Courts of the United States," and the question being whether said Act vested jurisdiction in the Circuit Courts, this Court held,

"that the words seem to refer to the form of the "action, rather than to the forum. When it "is remembered that a penalty may be recovered "by an indictment or information in a criminal "action, or by a civil action, in the form of an ac- "tion of debt, and also that the Circuit Courts of "the United States are, as contradistinguished from "the District Courts, the Federal Courts of orig- "inal civil jurisdiction, the significance of this "clause is clear. It in effect provides that, "although the recovery of a penalty is a proceed- "ing criminal in its nature, yet, in this class of "cases it may be enforced in a civil action, and in "the same manner that debts are recovered in the "ordinary civil courts."

In U. S. *vs.* Mooney, 116 U. S., 104, this Court, construed the Act of 1875, which gave the Circuit Court original cognizance concurrent with the Courts of the several States, of all suits of a civil nature, at law or in equity, where the matter in dispute, exceeds, exclusive of costs, the sum of five hundred dollars, and arising under the Constitution or laws of the United States, etc., as not covering or embracing actions for a penalty.

This language is as broad as that found in the copyright act of 1819, or the Revised Statutes, Section 629, Clause 9. It seemed to cover all cases of a civil nature, at law or in equity, but still it was held, that as it did not specifically refer to penal actions, criminal in their nature, it did not affect the jurisdiction of the District Courts over actions of that character.

(*d.*) Counsel refers to several actions of which he says, the Circuit Courts assumed jurisdiction, with the tacit approval of this Court, but in none

of those cases was the question under discussion raised or presented for determination.

(*e.*) In reply to counsel's suggestion that Taft *vs.* Lithographic Co., 37 Fed., 726, referred to in our brief (p. 18), has never been overruled or questioned, it is a sufficient answer to say that it was never before any Court for review, and has never been cited or followed in any case to which our attention has been called.

Respectfully submitted,

A. J. DITTENHOEFER,
Of Counsel.

No. 273.

Brief of Olin for D. E.

Filed April 21, 1899.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

CASE No. 16,838,

TERM No. 273.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

WILLIAM A. BRADY, PLAINTIFF IN ERROR,

vs.

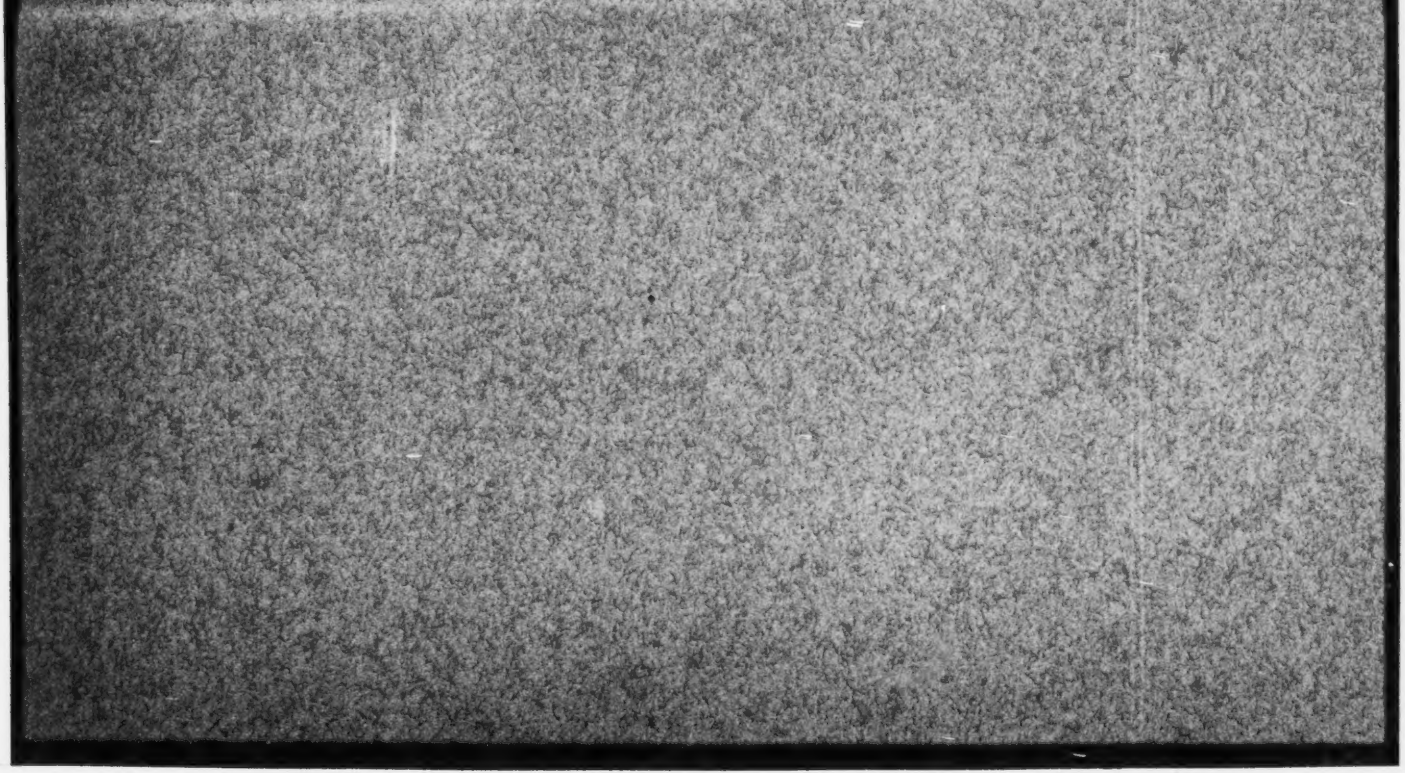
AUGUSTIN DALY, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF AUGUSTIN DALY, DEFENDANT IN ERROR.

STEPHEN H. OLIN,
Of Counsel for Defendant in Error.

Evening Post Job Print, New York.



Supreme Court of the United States,

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WILLIAM A. BRADY,
Plaintiff in Error,

vs.

AUGUSTIN DALY,
Defendant in Error.

BRIEF ON BEHALF OF AUGUSTIN DALY, DEFENDANT IN ERROR.

Statement of Facts.

The defendant in error respectfully refers to the statement by LACOMBE, *J.*, in the Circuit Court of Appeals (Record, p. 172), and to the findings of fact in the Circuit Court by SHIPMAN, *J.* (Record, pp. 24–30, 32).

ARGUMENT.

There were thirty-four assignments of error. Judge LACOMBE, delivering the opinion of the Circuit Court of Appeals, took up *seriatim* those relied upon by the plaintiff in error in that Court. The

same course will be here pursued, giving as to each point what Judge LACOMBE said in disposing of it, and adding further argument and citation of authorities.

I.

"It is contended that the penalty is incurred only when substantially the whole of a copyrighted play is reproduced. This contention, however, has been already disposed of by this Court. The penalty of the statute is imposed when 'any dramatic composition for which a copyright has been obtained' is publicly performed without the consent of the owner. In Daly *v.* Webster, 1 U. S. App. 573, 4 C. C. A., 10, 56 Fed. 483, we held the railroad scene in 'Under the Gaslight,' considered by itself, apart from all other acts and scenes in such play, to be a dramatic composition, and, as such, protected by the copyright which plaintiff had obtained; and no reason is shown for reversing or modifying that decision. When any one, without the owner's permission, publicly performs substantially that whole railroad scene, he substantially performs a dramatic composition which is covered by the owner's copyright."

LACOMBE, *J.*, Record, page 175.

"The first enquiry is what is meant in the Act of 1856, by a 'dramatic composition,' * * * A composition, in the sense in which that word is used in the Act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. * * * A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed

or suited for public representation, as if language or dialogue were used in it to convey some of the ideas.

The 'railroad scene' in the plaintiff's play is undoubtedly a dramatic composition."

BLATCHFORD, *J.*, in Daly *v.* Palmer, 6 Blatchf., 256; 6 Fed. Cas., 1132, 1135.

"Upon the main point of the case, namely, whether the combination or series of dramatic events (apart from the dialogue), which makes up the particular scene or portion of the play claimed to be infringed, is a dramatic composition, and as such entitled to protection under the copywright laws, it is necessary to add but little to the exhaustive opinion of Judge Blatchford reported in Daly *v.* Palmer, 6 Blatchf., 256. The same scene in the same play is elaborately discussed by him, and in his conclusion, that it is a dramatic composition we concur."

Daly *v.* Webster, 1 U. S. App., 573; 4 C. C. A., 10.

It may be said that the amendment to the section, adopted in 1897, by retaining the language thus interpreted, adds the sanction of Congress to the authority of the Circuit Court of Appeals.

29 U. S. Stat. at Large, 481.

The statute provides that a "dramatic composition" is to be copyrighted as a book. The book may contain one dramatic composition, or more than one, independent or connected.

It may include several scenes, or several acts or several plays in series or disconnected, but under the definition in Daly *vs.* Palmer, the dramatic composition is in either case protected, and the infringer cannot defend himself by saying that there were other dramatic compositions protected by the same copyright which he did not infringe.

The case of Rogers *vs.* Jewitt, much relied on by counsel below, is not an interpretation of § 4966, but

of the section which now appears as § 4964. Bearing in mind what the words "dramatic composition" mean, the language of Judge Curtis applies to the case in hand, for Brady infringed the whole dramatic composition; but it is proper to say that Rogers *vs.* Jewitt has been criticized. Mr. Drone discusses it and concludes:

> "In this view of the law, the forfeiture would attach when a work consists chiefly or largely of pirated matter, or when it contains a large or valuable part of a book, entitled to protection."
>
> Drone on Copyright, 488, 490.

If this be the law it would make no difference in the case at bar, whether the Court considered the "railroad scene" or the play of "Under the Gaslight."

The railroad scene is protected because it is itself a dramatic composition. It is equally protected because it is a material and valuable part of a larger dramatic composition.

> "The chief value of the play of 'Under the Gaslight,' and its popularity, depends upon the said railroad scene or sensation contained in it, and upon the representation of said scene only, which scene constituted its essential feature; and * * * the sole commercial value of the said play of 'Under the Gaslight' and the source of its power of earning royalties consisted of the said railway scene."
>
> Finding IX., p. 18.

Decisions under the patent law are to the effect that where only one claim of a patent is valuable the infringement of that claim will subject the defendant to payment of a royalty fixed for the use of the whole patent.

> Westcott *v.* Rude, 19 Fed., 830.
> Wooster *v.* Simonson, 16 Fed., 680.

When the patented features constitute the essential features of a machine and give it its merit,

without which the machine would be valueless and unsalable, the damages and profits for infringement must be calculated on the basis of the entire machine.

Tatum *v.* Gregory, 51 Fed., 446.
Putnam *v.* Lomax, 9 Fed., 448.
Fitch *v.* Bragg, 16 Fed., 243.
Garretson *v.* Clark, 111 U. S., 120.

In England the penalty of forty shillings is imposed for production of a portion of a copyrighted play.

It is true, as has been suggested by Mr. Brady's counsel, that the English statute after the words "dramatic piece" adds "or any part thereof," but the courts do not consider this addition important. In Chatterton *v.* Cave (3 App. Cas., 483, 498)

Lord O'HAGAN said:

> "It is true, it was impressed upon your Lordships, that the Act of Geo. III., does not contain the words 'or any part thereof' which are inserted in the Statute of Will. IV.
>
> But this does not appear to me to create any real distinction between them.
>
> Some such words must necessarily be implied in the earlier statute, otherwise the author of the book could not bring his action unless there had been a piracy of the whole of its contents, and any partial appropriation of them could not authorize the claim for a penalty.
>
> No one has suggested a construction so manifestly inconsistent with the clear purpose of the Legislature, and it seems to me that all the authorities as to a partial taking are fairly applicable to the Dramatic Copyright Act, and if so, an infringement of it to be penal must be material and of a substantial kind. * * * The question in every case must be a question of fact."

It was presumably upon this theory that omission is made of the words, "or any part thereof," in

Stephen's Digest of the Law of Copyright which is annexed to the report of the English Copyright Commissioners (*Report of Copyright Commissioners* of 1878, p. LXXXII), showing that in the opinion of English Courts and lawyers, the words "or any part thereof" are surplusage and may be omitted without affecting the sense of the statute.

Judge Lacombe, in the paragraph cited above says that no reason is seen for reversing or modifying the decision in Daly *v.* Webster (1 U. S. App., 573). It is respectfully submitted that even if the Court saw reason for so doing the law cannot now be stated otherwise than in Daly *v.* Webster, because that decision is *res adjudicata* in this action. It stands unreversed and is therefore binding upon the plaintiff in error, who was a party to it. On familiar principles he is bound by that decision upon the law as well as the facts.

Southern Pacific R. R. Co., *vs.* the United States, 168 U. S., 1.

II.

"It is contended that it was error 'to exclude evidence offered by defendant that the manner of the rescue is not a material part of plaintiff's play.' We have searched the record carefully, but in vain, for any such offer. It does appear that defendant 'offered to prove that the play, "After Dark," drew as much money, and was as valuable, in a pecuniary or in a commercial sense, with the railroad scene performed in the manner not violative of plaintiff's rights, as held by the Circuit Court of Appeals,' and, to support his offer, asked a witness who had testified as to performances of 'After Dark' this question:

> 'Will you state the difference in business between the railroad scene as performed when

> one character was rescued by another, and as performed when the character rescued himself by staggering off the track?'

The question was excluded, and exception reserved. If it were material and proper for defendant to show that the 'manner of the rescue' was 'not a material part' of 'Under the Gaslight,' he certainly would not show it by proving that the manner of the rescue was not a material part of the other play, 'After Dark.'"

LACOMBE, *J.*, p. 176.

The offer referred to by Brady's counsel (p. 62) was as follows:

> "We offer to prove by the plaintiff that *the play, 'After Dark,'* drew as much money and was as valuable * * * with the railroad scenes performed in the manner not violative of plaintiff's rights." * * *

This was not rejected "on the ground of *res adjudicata*," as counsel has stated, but on the ground of irrelevancy.

The evidence did not tend to show that the railroad scene was not an important part of plaintiff's play, but that it was not important in defendant's play. It was therefore irrelevant. The question was not whether the defendant acted wisely in infringing, but only did he infringe?

It may be noted that no such error is assigned among the thirty-four errors originally assigned.

III.

"It is next assigned as error that the Court below permitted defendant's answer in the equity suit to be used against him in this action. The answer

came in as part of the record in the equity suit. When such record was offered by plaintiff, defendant objected to its introduction on eight separate grounds, which were set forth specifically, but not on the ground that a sworn pleading of the defendant was offered against him in an action to enforce a penalty. Incidentally, it may be noted that, in the answer in the action at bar, defendant repeatedly refers to the record in the equity suit, and asks that the first decree of the Circuit Court therein, and the proofs upon which it was granted, be made a part of his answer. It may well be doubted whether he is now in a position to urge the assignment of error above set forth; but, if he were, it certainly should not avail him. The answer in the equity suit contained no admission obtained from the pleader by the equity court. It denies all the material allegations of the complaint. Undoubtedly, as pointed out in the brief, it does not admit that performances of 'After Dark' were given by defendant, but only of the version which did not infringe. In view of the fact that the record in the equity suit was admitted 'for certain purposes' only, and the statement by the Circuit Judge that no pleading of the defendant has been used or taken in evidence in ascertaining any facts as to performances, or for the enforcement of any alleged liability in this case, we are unable to find any harmful error in the admission of the answer in the equity suit."

LACOMBE, *J.*, p. 176.

(*A.*) The relevancy of evidence is to be determined by the pleadings.

In paragraph X. of the complaint in the action at bar, it was alleged that the facts set forth in the preceding nine paragraphs had been embodied in a bill in equity filed May 20, 1889, in the Circuit Court of the United States for the Southern District of New York, and that said action was eventually decided in favor of the plaintiff and a final decree en-

tered adjudging the number of infringing performances of "After Dark" to be 747 (p. 6).

In paragraph XII. of his answer, Brady admitted the filing of the bill and the entry of the decree, and continued as follows:

> "And he denies the allegations of the tenth paragraph of the complaint, excepting as they may accord with the bill of complaint so filed and the said decree entered, *to which complaint, final decree and the record in said suit this defendant begs leave to refer*" (p. 9).

In paragraph XIV. of the answer the defendant Brady as a second defense set out at some length the proceedings in the equity suit. He alleged that the bill in that suit related to the copyright of "Under the Gaslight."

> "Which is the same play or dramatic composition referred to in the complaint in this action." (pp. 9, 10).

The answer alleged that the bill claimed that Brady had produced in divers cities of the United States, the railroad scene in "After Dark."

> "Being the same scene referred to in the complaint herein, and claimed the same to have been an imitation of the railroad scene claimed by the plaintiff in the play referred to in the complaint." (p. 9).

Brady alleged that an order was entered in the equity suit denying the application for a preliminary injunction.

> "*To which order and the papers upon which the same was granted this defendant begs leave to refer and make the same a part hereof.*" (p. 10).

The answer then alleged the entry of a decree in the equity suit after trial before Hon. ALFRED C. COXE,

> "*to which decree* and the proofs upon which the same was granted, *this defendant begs leave to refer, and makes the same a part hereof.*" (p. 10).

The answer then alleged that

> "the performances claimed in the complaint herein to have been given by the defendants and claimed to be a violation of the rights asserted and claimed by the plaintiff * * * *are the same performances* which were adjudged and decreed," &c.,

in the equity suit (p. 10).

In paragraph XV. of the answer was set forth a third defense, in which it was alleged that the equity suit had proceeded to final judgment,

> "and that, by reason and virtue of the decision and mandate of the Circuit Court of Appeals for the Second Circuit, a judgment was entered and procured by the plaintiff in the said suit in equity, *to which decree and the record and proceedings in said action this defendant begs leave to refer*" (p. 11).

The fourth and fifth defenses reiterate and again allege all the preceding allegations, and they are all again repeated as defenses to the second cause of action in paragraphs XVIII. to XXII.

Thus the plaintiff in error, in ten different paragraphs of his answer, presented to the Court "as a part" of his answer and as material, relevant and competent evidence the record in the equity suit. He described it generally and enumerated the particular steps and proceedings in it. He asserted that the copyright in question and the infringing performances were the same in the equity suit and the action at law. He asked the Court to consider the record as a whole and each part of it separately.

This pleading was then an offer of the record in evidence, an admission of its materiality and competence, and a waiver of any objection to it, and

whether considered as an offer, an admission or a waiver, forbids the plaintiff in error to claim that the reception of the record was error.

McGillin *v.* Bennett, 132 U. S., 445.
Pope *v.* Allis, 115 U. S., 363.
Linsday *v.* People, 63 N. Y., 143.
Paige *v.* Willet, 38 N. Y., 28.
Vandervoort *v.* Smith, 2 Caines, 155.

(*B.*) For the reasons last stated, it might be urged that Brady had lost his right to object to the Master's Report which formed part of the record. But, however this may be, he was not prejudiced in this regard, because in the 6th conclusion of law the Court in effect struck out the Master's Report as a basis for the plaintiff's recovery.

> "The evidence as to these performances and all performances subsequent to August 24, 1891, is entirely independent of the evidence obtained from the defendant by the plaintiff's examination of him in the accounting before the Master in the equity suit mentioned in the prior finding of facts. No pleading or evidence of the defendant has been used or taken in evidence in ascertaining any facts as to performances or for the enforcement of any alleged liability in this case." *Special findings of fact* (p. 42).

This cured any possible error in admitting the report

(*C.*) The answer in the equity suit was not the foundation of the decree in the sense claimed by the plaintiff in error, because it was in effect a general denial. Daly did not prevail in the equity suit by probing Brady's conscience, but by overcoming Brady's sworn denials by proof.

Counsel stated that Brady was obliged, under oath, to admit that the performances of "After Dark" were given by him, and that this was an all important link of the plaintiff's proof. But in-

spection of the answer shows that Brady did not admit any production of the play of "After Dark" except the production at the People's Theatre, which has been held not to be an infringement (pp. 46, 47). The performances at the People's Theatre were not in any way the foundation of the present suit. The decree in the equity suit did not rest on the performances in the People's Theatre, admitted by defendants, but on proof of other performances established by Daly's proofs against Brady's denials.

It is further to be noted that the allegation that Brady produced "After Dark" was not disputed on the trial, but assumed by defendant's counsel (pp. 62, 78, 139), and was abundantly proved by the witnesses called after the case was reopened (pp. 101, 110, 112, 118, 131).

IV.

"It is next assigned as error that the Court below held that the decree in the equity suit of itself established plaintiff's cause of action, and was *res adjudicata* as to plaintiff's copyright and defendant's alleged infringement. Manifestly, the Court below did not hold that the 'decree in the equity suit of itself established plaintiff's cause.' When that decree was the only evidence, it declined to find for the plaintiff. Nor is there anything to show that the Court held that the equity decree was *res adjudicata* as to defendant's alleged infringement. The record in the equity suit was competent evidence of the fact that the railroad scene in 'After Dark'—the unaltered version—was substantially identical, in words, actions, circumstances, and accessories, with the railroad scene in 'Under the Gaslight'; and defendant offered no evidence to controvert it. The Court, however, did hold that the validity of the copyright, being determined by the equity decree, was *res adjudicata* between the parties to the

action at bar, and excluded evidence offered by defendant (being the same evidence considered in the equity suit) to show that plaintiff's railroad scene was not novel. In this there was no error. The question of validity was one of the issues in the equity suit, and that Court adjudged that the copyright obtained by Daly on August 1, 1867, was good and valid; that he was the author of the dramatic composition entitled 'Under the Gaslight,' and that the railroad scene in such play was itself a dramatic composition, and protected by said copyright. To this equity suit, Daly and Brady were parties. The action at bar is not brought by the government, but by the individual whose rights have been trespassed upon, to recover the damages which the statute gives him from the individual who has committed the trespass. Both parties to the action were parties to the suit and under familiar principles, a question at issue between them which has been once finally decided by a court of competent jurisdiction cannot be again contested in the same or any other court."

LACOMBE, *J.* (p. 177).

The decree was held to be *res adjudicata* upon the question of the validity of the copyright to the extent of excluding evidence which had been offered on the trial in equity and not otherwise.

The defendant's counsel offered certain publications with this comment:

> "We propose to show that the plaintiff's copyright is good for nothing by offering the same evidence which was before Judge COXE." (p. 63).

The publications offered were a copy of the *Galaxy* containing "Captain Tom's Fright" (p. 63), a play called "London by Night" (pp. 70, 71), a book called "Railroad Station" (p. 74), a play called "Scamps of London" (p. 77). All these publications were excluded on the ground that the former

decree was an adjudication of the validity of the copyright. No other evidence was excluded on this ground.

No other evidence was offered by the defendant except at page 62 already referred to, an offer plainly immaterial and rejected on that ground.

The Court forbade him to offer again the same evidence which, on the same issue of the validity of the copyright, had been in a suit between the same parties, passed upon by the Circuit Court and Court of Appeals, from whose final judgment appeal had been taken to the Supreme Court and dismissed.

On the question of the validity of the copyright the Court held the decree conclusive evidence. On other issues, where it was evidence at all, it was the only evidence before the Court, no attempt being made to dispute it.

This ruling was within Southern Pacific Railroad Company *vs.* United States (168 U. S., 1), and cases cited.

It has been already pointed out, that Brady in his answer sets up the decree of Judge Coxe, on the first trial of the equity suit as an adjudication of the issues involved in this action. And at the close of the case he moved for judgment on the ground—

> "XX.—That the prior decree in the equity suit was *res adjudicata* on the question of damages." (p. 78).

He cannot then be heard to deny that the final decree in the equity suit, was such an adjudication.

V.

"It is further contended that the Court below committed error in limiting defendant upon the new trial to proof as to the number of performances.

The record fails to disclose that defendant offered any evidence at all in the second trial or that any was excluded. The order disposing of the motion for new trial, provided that such motion be 'granted to the extent that the cause is opened for the purpose of allowing either party to present additional testimony in regard to the numbers and times of the representation, if any there were, of the play of "After Dark" by the defendant.' It certainly did not preclude the defendant from offering any testimony which might become necessary or expedient by reason of the change of situation produced by plaintiff's additional proof, or, indeed, from offering any which he had neglected to put in through oversight. Manifestly this assignment of error is an afterthought. Had defendant had any further proof which he wished to put in, it must be assumed that he would have offered it."

LACOMBE, *J.*, page 177.

When the plaintiff below rested, the defendant Brady moved to dismiss the complaint on thirty-two grounds (p. 138), then filed requests to find (p. 140) and the case was closed.

The defendant Brady, after the case was reopened, demanded a jury, but he does not now allege the refusal of trial by jury as error, having abandoned the ninth assignment of error originally filed. Of course there is nothing in the point.

A waiver of a trial by jury had been filed (p. 75). This was a proper compliance with R. S., 649, and deprived the plaintiff in error of any right to a trial by jury so long as the nature of the case and the real issue between the parties remained the same unless the Court in its discretion permitted the stipulation to be vacated.

Bamberger *v.* Terry. 103 U. S., 40.

Were it otherwise and were the waiver for any cause insufficient, the consequence would be that

this Court would affirm the judgment leaving the plaintiff in error to file a bill of review.

Bond *v.* Dustin, 112 U. S., 604.
Branch *v.* Texas L. M. Co., 53 Fed., 849.
Rush *v.* Newman, 58 Fed., 158.
Smith *v.* Weeks, 53 Fed., 758.
Merrill *v.* Floyd, 53 Fed., 172.
Cudahy Packing Co. *v.* Sioux Nat. Bank, 69 Fed., 782.

The whole question of granting or refusing a new trial was wholly within the discretion of the trial Court and cannot be reviewed.

Ind. & St. L. R. Co. *v.* Horst, 93 U. S., 291, 301.
Newcomb *v.* Wood, 97 U. S., 581.
Alexander *v.* U. S., 6 C. C. A., 602.
Atc. T. & S. F. R. Co. *v.* Howard, 49 Fed., 206.
Missouri P. R. Co. *v.* Chic. & A. R. Co., 132 U. S., 191.

The discretion of the learned trial Court was exercised with care (p. 23).

VI.

"It is next contended that the trial Judge 'erred in permitting the plaintiff upon the new trial to present the evidence of the number of performances which was obtained from the information given by the defendant under compulsion in the equity suit.'

There is nothing in the record which will enable us to say that any of the evidence presented on the second trial 'was obtained from the information given in the equity suit.' The counsel for plaintiff in error so asserts, but his brief contains no refer-

ences to support such assertion. No witness was interrogated upon this point, and no proof of the assertion offered."

LACOMBE, *J.*, p. 178.

The contention of the plaintiff in error here referred to has no support in the record. Among the almost countless objections made to the admission of evidence no hint appeared of the point thus taken. No suggestion of it was made among the 32 grounds given for dismissing the complaint (p. 38), nor among the 43 proposed findings of fact and law (pp. 140-145), nor among the 57 exceptions (pp. 147-152), nor among the 34 errors assigned when the plaintiff in error prosecuted his writ of error (pp. 153-160).

It is a mere afterthought resting on a mere assumption.

It nowhere appears that Mr. Daly or his counsel used Brady's testimony as a help in obtaining evidence. It is apparent that the testimony could not have given them such help, since it furnished no dates or order during the period in question (after September, 1891), (p. 60). Such help was not necessary to Daly, since all these performances were public, advertised and described in the public press, and it is an unjustifiable assumption that Brady's evidence was used in any way except before the Master.

VII.

"It is further contended that the performances given by defendant intermediate the decisions of the Circuit Court in the equity suit holding the copyright invalid and the reversal by the Court of Appeals were not willful violations of plaintiff's rights, and for that reason the statutory penalty was not incurred.

The statute, however, provides that 'any person publicly performing or representing,' &c., shall be liable for the damages therein fixed. It does not make willfulness an essential element of the offense, and no authority to which we are referred calls for such a construction."

LACOMBE, *J.*, 178.

The act of Brady in using the railroad scene was done with a full knowledge of Daly's claim and of the decision of Judge BLATCHFORD, both of which were fully stated in the bill of complaint in equity. It is true that Judge WALLACE had with reluctance declared Daly's copyright bad for a technical flaw, but Brady knew that Daly was prosecuting his suit with the intention of causing this decision to be re-examined and that if the Court should ultimately hold with Judge BLATCHFORD all performances would be in violation of Daly's rights. Nevertheless he performed the play 747 times, and that although he had invented another railway scene, which was not an infringement and which as he claims would have been equally profitable.

His act was willful, with full knowledge of his position. He deliberately took the chance of sustaining the first judgment, and when it was reversed it afforded him no protection.

Freeman *v.* Clay, 52 Fed., 1.

Besides, "it is no defense to an action for the violation of playright that the defendant has not knowingly or intentionally committed piracy."

Drone on Copyright, 638.

Where the infringement is otherwise established the intention is immaterial.

Fishel *v.* Lueckel, 53 Fed., 499.

Reed *v.* Holliday, 19 Fed., 325.

This is emphasized in the recent amendment of the statute which makes *willful* infringement a misdemeanor (§ 4966, amended 1897).

29 U. S. Stat., at Large 481.

VIII.

"It is contended that plaintiff by first proceeding in equity for an accounting for profits made an election barring him from a recovery for penalties. In view of the fact that there was in the equity cause no accounting of profits and no election to endeavor to obtain profits, and no finding and no adjudication upon the subject of profits, we are not satisfied that plaintiff made any election barring him from suing for damages or penalties."

LACOMBE, *J.*, p. 178.

On this subject the trial Court found as follows:

> "The decree did not direct the Master to ascertain anything in regard to profits; no evidence was offered upon that subject and no finding was made thereon. A final decree in said cause, accepting the Master's report and making the finding of the Master the findings of the Court was entered on April 1, 1893. No judgment or decree for profits was asked or rendered." (*Findings of Fact*, p. 30).
>
> "That there had been in this case no accounting of profits, and no election to endeavor to obtain profits for any representation of the dramatic composition which is the subject of this suit, and that there has been no finding and no adjudication upon the subject of profits." (*Conclusions of Law*, No. 8, p. 31).

A party who has elected to *take judgment* for his profits, which judgment has not been reversed, can-

not prosecute a second action for other damages arising out of the same acts of infringement.

Child *v.* Boston & F. Iron Works, 19 Fed., 258.

In patent cases the plaintiff is not bound to elect between profits and damages until he has ascertained by litigation which are the larger.

Pitts *v.* Hall, 2 Blatchf., 229.
Locomotive Safety Truck Co. *v.* R. R. Co., 2 Fed., 677.
Wooster *v.* Taylor, 14 Blatchf., 403.
Birdsall *v.* Coolidge, 93 U. S., 64.

In patent suits in equity the plaintiff may recover either profits or damages, but in copyright suits only the former.

Chapman *v.* Ferry, 12 Fed., 693.
Trow City Directory Co. *v.* Curtin, 36 Fed., 829.
Livingston *v.* Woodworth, 15 How., 546,

and in copyright cases a *qui tam* action for a penalty can be prosecuted concurrently with a suit for injunction.

Schumacher *v.* Schwencke, 25 Fed., 466.

Much more, when the equity suit has terminated in a judgment which does not award profits to the complainant, is he entitled to maintain his *qui tam* action.

Mr. Daly certainly did not make his election by filing the bill in equity, for at that time none of the acts of infringement now complained of had been committed. It is true that he might have recovered the profits of those acts of infringement in the equity action, since they were committed before the final decree, but that would have required another act of election, and it is not pretended that Daly ever asked for profits except in his bill of complaint.

Counsel below attempted to sustain his position as to election by citing various cases when the election relates to *right*, *e. g.*, between tort and contract. They have no relationto this question of the election of remedies.

IX.

"The last assignment of error is to the finding of the Court below that there were 126 infringing performances. This, however, was a special finding by the Court, a jury being waived, and an Appellate Court cannot look into the evidence upon which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony, and no such error is here assigned."

LACOMBE, *J.*, p. 178.

Stanley *v.* Supervisors, 121 U. S., 535, 547.

Ins. Co. of N. A. *v.* Int. T. Co., 71 Fed., 88, 90.

Walker *v.* Miller, 59 Fed., 869, 870.

X.

This case is unusual, if not unique, in that it was established that the actual damage sustained by Daly was greater than the amount of the "penalties" fixed by the statute for the period within the two years' limitation applied to actions for a penalty.

The findings of the Court show that Brady produced the infringing scene 747 times between June 19, 1889, and October 4, 1892, and that Daly had established the royalty of ten dollars for each per-

formance of the "railroad scene," and that this royalty was reasonable.

Findings XIII. and XIV., p. 18.

Daly claimed the right to recover the amount of these royalties as damages and the Court refused to allow this contention on the ground that there could be no recovery except under Section 4966 of the Revised Statutes; that the recovery allowed by this section is of a penalty, and therefore subject to the two years' limitation prescribed by Section 4968.

As neither party appealed from this ruling the question of its correctness is not before this Court.

As, however, the liability at law of the infringer of a copyright has not been fully declared except in this case, it may be proper to suggest briefly the considerations urged on the trial on behalf of the plaintiff's claim to recover damages actually sustained during six years before the commencement of the action.

The learned trial Judge held:

> "That Section 4966 of the Revised Statutes confers upon the courts of the United States their only jurisdiction in an action between citizens of the same State, for the recovery of damages for the unauthorized public performance and representation of a dramatic composition for which a copyright had been obtained."
>
> Conclusions of Law 8, p. 20.

The learned Judge cites Boucicault *vs.* Hart, 13 Blatchf., 47, as authority on this point. It is respectfully submitted that Boucicault *vs.* Hart does not so decide.

It holds in substance that courts of the United States will not, in a suit between citizens of the same State, enjoin the performance of an *uncopyrighted* play, but it does not hold that the jurisdiction of the Court depends upon Section 4966 of the Revised

Statutes alone, as distinguished from the rest of the statute.

Section 4952 of the Revised Statutes gives to the author of a dramatic composition the sole liberty of printing it, and also of publicly performing or representing it, or causing it to be performed or represented by others.

Can there be any doubt that under this section, if it stood alone, the Court would give the author such damages against an infringer as the author had actually sustained?

> "Though Rev. St. U. S., § 4964 provides for the forfeiture of every copy of the book and of such damages as may be recovered, &c., &c., yet that is not the sole provision on which a claim for relief may be founded, but there is a separate right to relief against violations of the 'sole liberty of printing' the copyrighted work given by § 4952."
>
> Gilmore *v.* Anderson, 38 Fed., 846.

> "The 3 and 4 Will. IV., c. 15, contains only two sections. The first section enacts that the author of any dramatic piece shall have as his own property the sole liberty of representing or causing to be represented, &c., and shall be deemed the proprietor thereof.
>
> Had the statute stopped there, the proprietor of the dramatic work would have had a right to recover damages against any one who infringed his right of property by representing the production or so much of the production as to infringe his right of property in it, but there might have been frequently difficulty in getting a jury to find more than nominal damages.
>
> By the second section it is provided that if any one represents any such production or any part thereof, the damages shall be at least 40 shillings with double costs."
>
> Chatterton *v.* Cave, 3 App. Cas., 500.

This section gives an ordinary cause of action for damages not affected by the special limitation of two

years provided by Section 4968, "in case of forfeiture or penalty" (Drone on Copyright, 639).

Section 4966 provides that a person publicly performing a copyrighted dramatic composition "shall be liable for damages therefor, such damages in all cases to be assessed at such sum not less than one hundred dollars for the first performance, and fifty dollars for every subsequent performance, as to the Court may seem just."

This was clearly intended to add to the rights of the owner of the copyright. As interpreted by the trial Court, the section diminishes those rights on the one hand while it extends them on the other. By holding Section 4966 to be penal in its effect the two years statute of limitation is made applicable.

It was urged on the trial that the mere fact that the statute fixes a minimum rate of damages does not make this an action for a penalty in any sense which either gives the defendant a right to refuse to testify or requires the Court to interpret the statute as if it were penal.

A penalty in the sense now under consideration is defined by Bouvier as "the punishment inflicted by law for its violation. The term is mostly applied to a pecuniary punishment."

A forfeiture is defined by the same author as "A sum of money to be paid by way of penalty for a crime."

The copyright statute contains several examples of penalty and forfeiture. By Section 4960, for every failure to deliver or deposit in the mail certain papers the proprietor of the copyright "shall be liable to a penalty of twenty-five dollars to be recovered by the Librarian of Congress, in the name of the United States," &c.

By Section 4963, every person who shall insert a notice of copyright upon any book and for which he has not obtained a copyright "shall be liable to a penalty of one hundred dollars recoverable one-half to the person who shall sue for such penalty and one-half to the use of the United States."

By Section 4964, every person who shall without due consent of the proprietor of the copyright, print, publish or import a copyrighted book "shall forfeit every copy thereof to such proprietor and shall also forfeit and pay such damages," &c.

By Section 4966, if any person shall without the consent of the proprietor of a map, chart or other article of those enumerated in the section, print or copy such map or chart, &c., "he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession * * * and in case of a painting, statue or statuary he shall forfeit ten dollars for every copy of the same in his possession or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the United States."

To these sections succeeds Section 4967. Every person who shall print a manuscript without the consent of the author or proprietor "shall be liable to the author or proprietor for all damages occasioned by such injury"; and Section 4966 (the one here applicable) is in similar terms.

Any person publicly performing a copyrighted dramatic composition without consent "shall be *liable for damages therefor*, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the Court shall appear to be just."

Why is it that Congress has in this section used neither the word forfeiture or penalty? Obviously because the section does not provide for a "punishment inflicted by law for its violation," but only for the compensation to the injured party for his injury.

Sections 4960, 4963, 4964 and 4965 provide for the forfeiture of "sums of money to be paid by way of penalty for crimes."

Part of these forfeitures go to the Government.

While intended to punish and prevent crime they do not directly attempt to compensate the injured. Indeed in the case of the forfeiture of one dollar for each sheet found in the wrongdoer's possession, the sum paid as forfeit varies inversely as the damage inflicted on the owner of the copyright, since the wrongdoer pays on those copies which he has not parted with.

But in Sections 4966 and 4967, the law provides not for punishment but for compensation. In regard to the wrongful printing of manuscript it is impossible to say what damage should be given, and so the Court is left to fix it; but the damage caused by each performance of a play can be stated with some approximation to accuracy, and, as it would be very difficult to prove the damage in each case, a reasonable sum is fixed as the measure of damage, such a sum as may fairly be supposed to equal an ordinary royalty, if the production of the play has been licensed.

A similar exercise of legislative power is the statute fixing the measure of damages in case of the failure to pay money when it is due.

The actual damage sustained by the creditor varies in different cases. It may be very slight, or it may be two or three per cent. or more. It is always a troublesome thing to ascertain and establish by legal proof. Under these circumstances the law provides that the measure of damages in such cases shall always be six dollars for a hundred for each year. It is in effect a statutory assessment of damages.

See O'Brien *vs.* Young, 95 N. Y., 428.

It is submitted that this is closely analogous to the statute under consideration.

A man who wrongfully retains money is liable in damages to the amount of sixty dollars a thousand for each year.

A man who wrongfully produces a play is liable

in damages to the amount of fifty dollars for each performance.

In each case the Legislature is fixing damages at a reasonable or average figure, and not imposing a punishment or penalty.

It follows from this that the statute under consideration is not penal, and is to be fairly construed to effectuate the legislative intention.

XI.

The judgment appealed from should be affirmed, with costs.

STEPHEN H. OLIN,
Of Counsel for Defendant in Error.

OLIN & RIVES,
Attorneys.

No. 278. 99

Sup. Ct. U.S.

Filed April 24, 1899.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

CASE No. 16,838.

TERM No. 278.

WILLIAM A. BRADY, PLAINTIFF IN ERROR,

vs.

AUGUSTIN DALY, DEFENDANT IN ERROR.

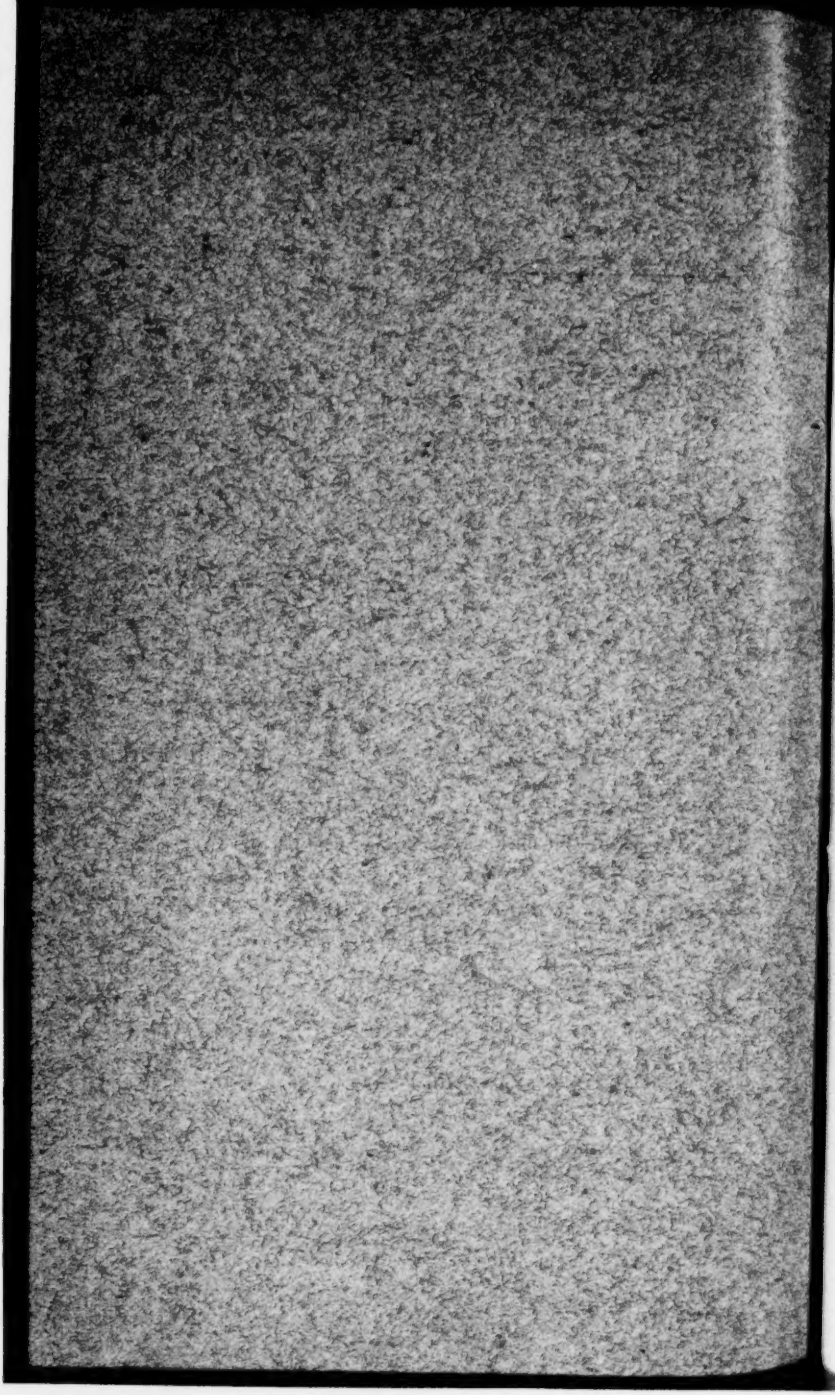
IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF AUGUSTIN DALY, DEFENDANT IN ERROR.

STEPHEN H. OLIN,

Of Counsel for Defendant in Error.

Evening Post Job Print, New York.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

WILLIAM A. BRADY, Plaintiff in Error, vs. AUGUSTIN DALY, Defendant in Error.	No. 273.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The brief of the plaintiff in error contains a point claiming that the Circuit Court had no jurisdiction of the case at bar.

As this point was never suggested in the Court below or at any time before the filing of this brief, the defendant respectfully asks leave of the Court to file this supplemental brief in answer to "Point I." of the brief of the plaintiff in error.

Our adversary has changed the order of his points from that used in the Court of Appeals. We ask

leave, therefore, to submit the following table of reference:

BRADY'S POINT					DALY'S POINT
II.	is	referred	to	in	I.
III.	"	"	"	"	III.
IV.	"	"	"	"	IV.
V.	"	"	"	"	VII.
VI.	"	"	"	"	VIII.
VII.	"	"	"	"	V.
VIII.	"	"	"	"	VI.

It should be noted that the order of the assignments of error at page 8 is different from either of those given above.

Supplemental Point in answer to Brady's Point I.

The claim that the Circuit Court has no jurisdiction of an action to recover a penalty is late and feeble.

The Judiciary Act of 1789 provides

> " That the District Courts shall have exclusive original cognizance of all suits for penalties and forfeitures incurred under the laws of the United States."
>
> Section 9.

This act, in conferring jurisdiction upon the Circuit Court, did not mention copyright cases, as was natural, considering that there was then no copyright statute. The first copyright law in 1790 provided that in case of violation there should be a penalty of

> " fifty cents a sheet to be recovered by action of debt in any court of record in the United States wherein the same is cognizable."
>
> Statute of 1790, Sec. 2, 1st Stat., 215.

The law of 1802 and the law of 1831 also impose penalties, providing for their recovery in like language.

Statute of 1802, Sec. 4, 2 Stat., 171.
Statute of 1831, Sec. 7 4 Stat., 436.

In 1856 copyright in dramatic compositions was created, and damages for unlawful performance were

> "to be sued for and recovered by action on the case or other equivalent remedy with costs of suit in any court of the United States, such damages to be rated and assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the Court having cognizance thereof shall appear to be just."
>
> Statute of 1856, 11 Stat., 138.

In 1861 an appeal to the Supreme Court without regard to the amount in controversy was conferred

> "from all judgments and decrees of any Circuit Court rendered in any action, suit, controversy or case at law or in equity arising under any law of the United States" relating to copyright.
>
> 12 Stat., 130.

In 1867 a fine for failure to deposit copies of a copyrighted book with the Librarian of Congress was imposed to be collected

> "in any District or Circuit Court of the United States within the jurisdiction of which the delinquent may be."
>
> 14 Stat., 395.

In 1870 there was a general revision of the copyright law, and it was provided that

> "all actions, suits, controversies and cases arising under the copyright laws of the United

> States shall be originally cognizable, as well in equity as at law, whether civil or penal in their nature, by the Circuit Court or any District Court having the jurisdiction of a Circuit Court."
>
> Stat. of 1870, Sec. 106, 16 Stat., 215.

It cannot be doubted that at this time Circuit Courts had full jurisdiction of an action to recover penalties under the copyright law, and that Section 9 of the Judiciary Act of 1789 above quoted had been repealed so far as it gave the District Courts exclusive jurisdiction in suits for penalties. Such was the law at the time of the revision, and the revisors took the grant of jurisdiction in copyright cases out of the chapter on copyrights and put it into a chapter relating to the Circuit Court, and finding the jurisdiction complete and unrestricted, they conferred it by a simple grant of jurisdiction

> " of all suits at law or in equity arising under the patent or copyright laws of the United States."
>
> R. S., Sec. 629, Clause 9.

Finding that the jurisdiction of the District Court in cases of penalties was no longer exclusive, they provided that the District Courts have jurisdiction

> "of all suits for penalties and forfeitures incurred under any law of the United States."
>
> R. S., Sec. 563, Clause 3.

The word "exclusive" was not used as in the Act of 1789.

The undoubted jurisdiction of the Circuit Court in actions for penalties under the copyright laws was not expressly terminated, nor could there be an implied repeal of an existing jurisdiction over certain suits at law by a grant of jurisdiction of all such suits at law. If an implied repeal can be imagined, it would not be effectual, because repeal by implica-

tion is not favored, and this rule, always in the mind of courts, is embodied in the repealing section of the Revised Statutes:

> "All parts of acts not contained in such revision having been repealed or superseded by subsequent acts or not being general or permanent in their nature."
>
> R. S., Sec. 5596.

The part of the Act of 1870 which conferred jurisdiction on the Circuit Court in penal cases had not been repealed or superseded by any subsequent acts, and it was general and permanent in its nature. It was therefore intended to be contained in the Revised Statutes, and Clause 9 of Section 629 is to be construed accordingly.

On these grounds Judge Thayer in Taft *v.* Lithographic Co., 37 Fed., 726, held in 1889 that the Circuit Courts had jurisdiction of *qui tam* actions under the copyright law, and his decision has never been overruled or questioned.

The Circuit Courts with the tacit approval of this Court have exercised jurisdiction in these cases.

Lithographic Co. *v.* Sarony, 111 U. S., 53.
Falk *v.* Heffron, 56 Fed., 299.
Springer Lith. Co. *vs.* Falk, 20 U. S. App., 296.
Wheeler *v.* Cobbey, 70 Fed., 487.
Bolles *v.* Outing Co., 45 U. S. App., 449.
Morrison *v.* Pettibone, 87 Fed., 330.
Johnston *v.* Klopsch, 88 Fed., 692.
Howell *v.* Miller, 91 Fed , 128.

In United States *v.* Mooney, 116 U. S., 104, cited in the brief, it was contended that the general clause in the Act of March 3, 1875, providing that the United States shall have cognizance concurrently with the courts of the several States, in suits of a

civil nature, &c., invested the Circuit Courts with jurisdiction of suits for penalties in customs cases, notwithstanding the exclusive jurisdiction of actions for penalties conferred on District Courts, under Section 9 of the Judiciary Act of 1789.

This Court considered the argument plausible, but not sound, for the reason that the general grant of power to the Circuit Court in the Act of 1875 was the same as the grant of power in the Judiciary Act of 1789; that the latter had been construed by the courts in a restricted sense, as not applying to actions for penalties, and hence, when Congress re-enacted the section, it must be assumed that they did so in the restricted meaning which for eighty-five years it had borne. But in regard to the copyright statute, the broad grant of power to the Circuit Court (R. S., § 629) was not in any form contained in the Judiciary Act and had not been given a restricted meaning by the courts, but was, on the contrary, a new clause intended to continue the admittedly unlimited jurisdiction of the Circuit Courts in patent cases which existed after 1870. United States *v.* Mooney, therefore, is not an authority on behalf of the plaintiff in error.

Lees *v.* The United States, 150 U. S., 476, is simply to the effect that the jurisdiction of the District Court is not necessarily ousted when the right to recover a penalty is given to the Circuit Court.

The brief contains the remarkable statement that

> "Prior to the Act of 1870 the general language vesting jurisdiction in the Circuit Courts over all actions, suits, controversies and cases at law or in equity arising under the patent or copyright laws of the United States was held not to confer jurisdiction over actions to recover penalties."
>
> Brief of the plaintiff in error, page 19.

No authority for this statement is cited, nor is it seen how any can be, since the "general language"

mentioned by counsel had never been employed to vest jurisdiction prior to the Act of 1870, and can hardly have been interpreted before it had been used. It may be asked also when the words used in the Statute of 1874 "had received a construction that did not include jurisdiction over action for penalties," as stated by counsel?

In answer to the suggestion on page 20 of the brief, it may be said that while doubt as to the jurisdiction has come late to Mr. Brady's counsel, it has not come to Mr. Daly's counsel at all.

April 20, 1899.

Respectfully submitted,

STEPHEN H. OLIN,
Of Counsel.

BRADY *v.* DALY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 52. Argued October 18, 1899. — Decided November 20, 1899.

Section 4966 of the Revised Statutes, enacting that "any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages, therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just," is not a penal statute and neither provides for the recovery of a penalty nor a forfeiture.

This action, being brought to recover damages for the violation of a dramatic copyright, and not being one to recover either a penalty or a forfeiture, the Circuit Court had jurisdiction of it by virtue of Rev. Stat. § 629, Subdivision 9, which confers upon Circuit Courts jurisdiction of all suits at law or in equity arising under the patent or copyright laws of the United States.

In the absence of any Federal statute of limitations, an action like this is limited by the limitation existing for the class of actions to which it belongs in the State where it was brought.

The question, as an original one, of how far a copyright of a play protects any particular scene therein from being publicly produced or represented by another, aside from the dialogue contained in the play, is not before the court in this case.

There was no election of an inconsistent remedy, which would bar the plaintiff from recovering in this action.

THIS was an action at law brought by Augustin Daly, and prosecuted since his death by the executors of his will, for

the violation of a dramatic copyright. In 1867 Daly was the owner of a dramatic composition entitled "Under the Gas Light," and in that year he took out a copyright therefor in the United States.

The play was produced by Daly and his licensees, and became quite popular, and he derived considerable profit from its production by himself and from the royalties he received. The chief value of the play and its popularity depended upon an incident in the third scene of the fourth act, commonly described as the railroad scene, where one of the characters is laid helpless upon a railroad track upon which a railroad train is momentarily expected that will run him down and kill him, and just at the last moment another of the characters contrives to reach the intended victim and drag him from the track as the train rushes in and passes over the spot.

After the play was produced, Dion Boucicault prepared a play called "After Dark," in which he introduced a railroad scene differing but slightly and only colorably from that which appeared in "Under the Gas Light." The plaintiff in error, defendant below, without the consent of Daly, produced and procured to be publicly performed on the stage in divers cities the play "After Dark," including the railway scene.

On the 20th of May, 1889, Daly brought a suit in equity against the plaintiff in error herein in the Circuit Court of the United States for the Southern District of New York, in which he prayed that the defendant might be perpetually enjoined from the further performance of the play "After Dark," upon the ground that the performance was an infringement of the copyright of his play "Under the Gas Light," and he asked for an accounting for all money and profits received by the defendant in that suit by reason of the performance of the play "After Dark" and of the railroad scene therein.

The complainant moved for a preliminary injunction, which was denied upon the ground that there was a material variance between the registered title and the published title of "Under the Gas Light," and that therefore the complainant had not a valid copyright. *Daly* v. *Brady*, 39 Fed. Rep. 265. After the taking of proofs on the issues joined by the defend-

ant's answer, the Circuit Court, following the decision of the court upon the motion for an injunction, dismissed the bill with costs. *Daly* v. *Webster*, 47 Fed. Rep. 903. An appeal was taken by Daly from this decree to the Circuit Court of Appeals, where it was reversed, and the cause remanded with instructions to enter the usual decree for an accounting and a perpetual injunction, the Circuit Court of Appeals holding that the plaintiff's copyright was valid, and the railroad scene in his play was itself a dramatic composition and protected by the plaintiff's copyright, which had been infringed by the defendant in the production of the play "After Dark," with the railroad scene therein. *Daly* v. *Webster*, 1 U. S. App. 573. The only charge of infringement consisted in the production of that scene.

Pursuant to the mandate of the Circuit Court of Appeals, a decree for a perpetual injunction was entered by the Circuit Court, November 5, 1892, and it was referred to a master to take proof of the number of unauthorized performances of the play "After Dark," with the railroad scene, which had been given by the defendant. The court did not direct the master, either in the decree or in the order of reference, to ascertain anything in regard to profits; no evidence was offered before him upon that subject, and no finding was made thereon. A final decree in the case, accepting the master's report and making his findings the findings of the court, was entered on April 1, 1893, but no decree for profits was asked or rendered.

Another appeal was taken to the Circuit Court of Appeals, and the decree affirmed, with costs, June 7, 1893. 11 U. S. App. 791.

The mandate of the Circuit Court of Appeals on this second appeal was filed in the Circuit Court, June 14, 1893, and a decree in conformity therewith duly entered. The defendant attempted to obtain a review of the judgment against him by appealing to this court, but his appeal was dismissed for the reasons stated in *Webster* v. *Daly*, 163 U. S. 155.

The present action was commenced July 14, 1893, by Daly against Brady, the plaintiff in error herein, in the United

States Circuit Court for the Southern District of New York, to recover damages for the violation of his copyright, placing their amount at $13,700. The complaint contained two counts, the first making no reference to section 4966 of the Revised Statutes, while the second alleged that the defendant had infringed his copyright in violation of the provisions of that section, and that "by virtue of the provisions of said act of Congress (the copyright act) and of said section 4966 of the Revised Statutes of the United States, the defendant then and there became liable to pay to said plaintiff the sum of $13,700, lawful money of the United States, as damages."

The answer of the defendant denied the infringement and set up various defences which are noticed in the following opinion. A jury trial was waived, and the court found the facts as above stated, and held that the copyright obtained by Daly was good and valid, and covered and protected the railway scene already described; that the acts of the defendant were in disregard of the copyright and of plaintiff's exclusive rights therein.

It was also found by the court that the evidence did not authorize an increase of the damages above the minimum amount provided for by section 4966 of the Revised Statutes, and that it had no power to establish a rule of damages below the minimum amount provided for therein, and that such section should be construed as penal rather than remedial in its character. The only testimony in this action on the hearing before the master as to the number of representations which the defendant Brady had given that were infringements of the plaintiff's copyright, and upon which a judgment for damages could be based, was the evidence of the defendant in the equity suit above mentioned, and introduced before the master in this action, and such evidence the court decided was inadmissible for that purpose, upon the ground that evidence obtained from a party by means of judicial proceedings could not be used against him for the enforcement of a penalty; and because of the absence of all legal evidence as to the number of representations the defendant was entitled to judgment, refusing any recovery for damages.

Subsequently, upon application to the court, the cause was opened and testimony, entirely independent of that of the defendant in the plaintiff's examination of him in the accounting before the master in the equity suit, was presented as to the number of times the play of "After Dark" had been produced by the defendant, with the railroad scene in it, and upon that evidence a finding was made that the plaintiff was entitled to judgment against the defendant of $50 for each performance falling within the period of two years prior to the commencement of the action; that is to say, for 126 performances, or the sum of $6300 with costs. The court restricted the plaintiff's right to damages to two years because it held that the action was brought to recover a penalty, and that the two years' statute of limitations applied. The defendant brought the case by writ of error before the Circuit Court of Appeals for the Second Circuit, where the judgment was affirmed, *Brady* v. *Daly*, 51 U. S. App. 621, and he then sued out a writ of error from this court, and the case is now here for review.

Mr. David Gerber for plaintiff in error. *Mr. A. J. Dittenhoefer* was on his brief.

Mr. Stephen H. Olin for defendants in error.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

The first objection made by the plaintiff in error to the judgment in this case is that the Circuit Court had no jurisdiction of the action because it was brought to recover a penalty or forfeiture under section 4966 of the Revised Statutes, and it was contended that the District Courts of the United States have by law exclusive jurisdiction over that class of actions.

Whether the District Courts still have exclusive jurisdiction over an action to recover for a forfeiture or a penalty arising from a violation of the copyright act, it is not necessary to

here determine, because we think that section 4966 of the Revised Statutes, upon which this suit is founded, is not a penal statute, and therefore the action in this case is not one to recover either a penalty or a forfeiture, and the Circuit Court had jurisdiction of the action by virtue of section 629 of the Revised Statutes, subdivision 9, which grants jurisdiction to the Circuit Courts "of all suits at law or in equity arising under the patent or copyright laws of the United States." Section 4966 of the Revised Statutes reads as follows:

"Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just."

The act of August 18, 1856, c. 169, 11 Stat. 138, was the first Federal statute which conferred upon the author or proprietor of any dramatic composition, designed or suited for public representation, "along with the sole right to print and publish the said composition, the sole right also to act, perform or represent the same, or cause it to be acted, performed or represented on any stage or public place during the whole period for which the copyright is obtained." The same act further provided that any "manager, actor or other person acting, performing or representing the said composition, without or against the consent of the said author or proprietor, his heirs or assigns, shall be liable for damages to be sued for and recovered by action on the case or other equivalent remedy, with costs of suit in any court of the United States, such damages in all cases to be rated and assessed at such sum not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just."

Section 101, of chapter 230, of the Statutes of July 8, 1870, 16 Stat. 198, 214, reënacted the provision of the act of 1856,

giving damages to the proprietor of any dramatic composition against any person wrongfully representing the same. Then came the revision of the statutes, and section 4966 embodies the provisions contained in the above mentioned acts of 1856 and 1870, in regard to the recovery of damages.

These statutes, it will be perceived, all use the word "damages" when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, "liable for damages therefor." This means all the damages, that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. The whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person in case the proprietor himself neglects to sue. It has nothing in the nature

of a *qui tam* action about it, and we think it provides for the recovery of neither a penalty nor a forfeiture.

If, upon the trial of such an action, the court should find from the evidence that the plaintiff had, in fact, sustained a greater amount than the minimum sum of damages provided in the statute, and should direct judgment in his favor for the sum so proved, would that judgment be for a penalty? On the contrary, it would be for the actual amount of damages which the evidence showed had been sustained by the plaintiff, and his recovery of that sum would be the recovery provided by the law for the wrong which he had suffered. When the evidence does not warrant a greater than the minimum recovery, the amount named in the statute still constitutes the remedy provided by the law, which plaintiff can pursue.

In *Huntington* v. *Attrill*, 146 U. S. 657, 667, there is a very full discussion of the meaning of the word "penal" when used in reference to the maxim of international law that "The courts of no country execute the penal laws of another." In the course of the opinion in that case it was stated by Mr. Justice Gray, speaking generally as to what constituted a penal statute, as follows:

"The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' *Hyde* v. *Cogan*, 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. *Bones* v. *Booth*, 2 W. Bl. 1226; *Brandon* v. *Pate*, 2 H. Bl. 308; *Grace* v. *M'Elroy*, 1 Allen, 563; *Read* v. *Stewart*, 129 Mass. 407, 410; *Cole* v. *Groves*, 134 Mass. 471. As said by Mr. Justice Ashhurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, 'it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.' *Woodgate* v.

Knatchbull, 2 T. R. 148, 154; *Read* v. *Chelmsford*, 16 Pick. 128, 132. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal law where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.' *Lake* v. *Smith*, 1 Bos. & Pul. (N. R.) 174, 179, 180, 181; *Wilkinson* v. *Colley*, 5 Burrow, 2694, 2698. So in an action given by statute to a traveller injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offence, or to conclude against the form of the statute, because, as Chief Justice Shaw said: 'The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment, but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity.' *Reed* v. *Northfield*, 13 Pick. 94, 100, 101."

Where the statute provides in terms, as the one before us does, for a recovery of damages for an act which violates the rights of the plaintiff, and gives the right of action solely to him, the fact that it also provides that such damages shall not be less than a certain sum, and may be more, if proved, does not, as we think, transform it into a penal statute.

So a statute which makes a person liable for his wrongful neglect or default by which the death of another person is caused, and which gives a right of action to the administrator for the benefit of the widow and next of kin, to recover damages for the pecuniary injuries resulting from his death, thus altering the common law and imposing a new liability, has been held by this court not to be penal, and to be enforceable in a State other than the State in which the statute was

passed, and in which the wrongful act and death occurred. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593; *Stewart* v. *Baltimore & Ohio Railroad*, 168 U. S. 445.

Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained.

The English statute of 3 & 4 William IV, c. 15, entitled, "An act to amend the laws relating to dramatic literary property," by its second section provides that a person who wrongfully produces and represents a dramatic composition "shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented."

In *Chatterton* v. *Cave*, 3 App. Cas. 483, 492, the court in speaking of this provision for damages said that the same "was no doubt fixed because of the difficulty of proving with definiteness what amount of actual damage had been sustained by perhaps a single performance at a provincial theatre of a work belonging to a plaintiff, whilst at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it." This does not look as if that statute were regarded by the English courts as one of a penal nature, but on the contrary as one of a remedial kind providing for the recovery of the damages sustained by the plaintiff, and providing for the recovery of a minimum sum for the reason, as stated by the court, of the difficulty of proving with definiteness in all cases the amount of damages which plaintiff really had suffered.

The court below was, as is stated in the opinion, somewhat influenced in its decision of this question by the belief that if this were not a penal statute there was no Federal statute of limitations applicable to it, and said that it could hardly be supposed that it was the intent of Congress to permit such a statutory rate of damages to run without Federal statutory limitation. If there were no such Federal statute, then the state statute would apply. Although not an action to recover a statutory penalty or forfeiture, still, in the absence of any Federal statute of limitations, it would be limited by the limitation existing for the class of actions to which it belongs in the State where the action was brought. *Campbell* v. *Haverhill*, 155 U. S. 610, 614.

We think the plaintiff in error fails to sustain his first objection to the judgment herein.

Another objection made is that section 4966 renders defendant liable only when substantially the whole of a copyrighted play is produced, and not when merely a single incident in one of the acts is represented.

In the equity suit between these parties, already referred to, the complainant therein alleged that he had a copyright of the play "Under the Gas Light," in which was the railroad scene, which made up the substantial value of the play and the one upon which the profits of the production of the play depended, and that the defendant had infringed upon the complainant's copyright by producing that same railroad scene in the defendant's play of "After Dark."

The answer of the defendant put in issue the existence and validity of complainant's copyright, denied any infringement whatever, and also raised the question whether there could be any infringement where the only part of plaintiff's play that was produced was the railroad scene as described.

Upon the trial of the issues the complainant succeeded, and obtained a decree which established the validity of his copyright, and determined that the railroad scene in the complainant's play, apart from the dialogue which accompanied the scene, was a dramatic composition, and entitled to protection under the copyright laws. *Daly* v. *Webster*, 1 U. S. App.

573. It determined also that there could be an infringement of the copyright when the only part of plaintiff's play that was produced was the railroad scene, and that the defendant had in that manner infringed the copyright of the plaintiff. An injunction was decreed and a reference made to the master to ascertain the number of times, etc., that the infringement had occurred.

In the opinion of the court, the case of *Daly* v. *Palmer*, 6 Blatchford, 256, where the same question arose in regard to the same scene, was referred to and followed. The judgment record in the equity suit was introduced in evidence in this case, and it was conclusive upon the matters which had been in issue in the suit as between these parties, and neither of them can ever again raise such questions between themselves. *Southern Pacific Railroad* v. *United States*, 168 U. S. 1. We have, therefore, the fact conclusively established by that record that this railroad scene was a dramatic composition, protected by the plaintiff's copyright. The section (4966) of the Revised Statutes covers such a case. Any person publicly performing or representing any dramatic composition protected by copyright, under the circumstances named in that section, is liable for the damages sustained by the proprietor, and as the fact is conclusively established between these parties that the railroad scene is a dramatic composition, and that it is protected by copyright, the statute covers such a case, and makes the plaintiff in error liable for the production of that scene.

The question as an original one of how far a copyright of a play protects any particular scene therein from being publicly produced or represented by another, aside from the dialogue contained in the play, is not before us, because the judgment in the equity suit between these same parties establishes the fact of the copyright, and also that the railroad scene is a dramatic composition protected by that copyright.

The plaintiff in error also contends that the trial court erred in admitting in evidence the record in the equity suit as proof of the material allegations of the complaint.

It does not appear herein that the record in the equity suit was admitted for the purpose stated. The record was admis-

sible for the purpose of showing the validity of the copyright, and that the railroad scene was a dramatic composition protected by it. The bill of exceptions herein shows that the record was not used for the purpose of proving the number of times the play of "After Dark" had been represented containing the railroad scene, nor in any way to show the amount of damages which the plaintiff had sustained by reason of the defendant's infringement of his copyright.

The further objection, that the answer of the defendant in the equity suit was inadmissible for the purpose of proving any admission of the defendant therein which might tend to render him liable for a penalty or forfeiture, becomes immaterial by our holding that the statute under which this action is brought is remedial and not penal. It appears, however, in this record that, although the answer was received as a part of the whole record in the case between these parties in the equity suit, it was not, nor was any evidence given by defendant, used upon the final hearing, in any way whatever, for the purpose of showing any admission on his part, but on the contrary, evidence outside and independent of any admission or evidence of the defendant was produced, and it was with reference wholly to such independent evidence that the recovery was granted. There was no error in this procedure.

The plaintiff in error further claimed that the plaintiff below, by first proceeding in equity for an injunction, and incidentally for an accounting of profits, made an election to recover profits, which effectually barred him from a recovery of damages under the statute.

The equity action was brought to enjoin the defendant from performing the play of "After Dark" with the railroad scene in it, taken from the plaintiff's play "Under the Gas Light," and the injunction was asked for on the ground that plaintiff's injuries could not be accurately ascertained or computed, and compensation for such injury could not be made by damages, and as a portion of the relief complainant asked that the defendant be decreed to render a full and true account of all money and profits received by him. The decree in that case, however, did not direct the master to ascertain anything in

regard to profits, no evidence was offered upon that subject, no finding was made thereon, and upon the coming in of the master's report no final judgment or decree for profits was ever asked or rendered.

In view of these facts, we think there was no election of an inconsistent remedy by the plaintiff in the action which would bar him from the maintenance of this action for the recovery of damages under the section of the Revised Statutes before referred to.

Conceding that he might in the equity suit have recovered profits if there had been an accounting concerning the same, and that a decree for their recovery would be a bar to a proceeding under the statute, yet the plaintiff was not bound to take such remedy; and when in fact he did not take it, and there was no accounting for profits in the equity suit, no decree made in regard to them and no recovery had, we see nothing to prevent the plaintiff in this action from recovering under the statute the damages which he has sustained by reason of the infringement of his copyright by the defendant.

Other objections were taken by the plaintiff in error upon questions of evidence which do not call for special consideration. They were properly disposed of by the court below.

Our ruling in this case, if it had obtained upon the trial, might have permitted a larger recovery than the plaintiff secured, because the statute upon which the action is founded, not being of a penal character, the two years' statute of limitations to which the plaintiff was limited in his recovery does not apply. But as the plaintiff did not seek to review the correctness of the decision of the trial court, and contented himself with the recovery actually obtained, his executors have now no cause of complaint on that account and they assert none.

Upon a full review of the case, we are of opinion that there was no error committed prejudicial to the plaintiff in error, and the judgment is, therefore,

Affirmed.